THE PUEBLO: A JURIDICAL EXAMINATION OF THE CONSIDERATIONS INVOLVED AND THE ALTERNATIVES AVAILABLE UNDER EXISTING INTERNATIONAL LAW AS APPLICABLE TO A COASTAL STATE'S SEIZURE OF A FOREIGN MAN-OF-WAR

by

Robert Boasberg

THE WORLD: A JUDICIAL CONSTRUCTION OF THE CONSTITUTIONS
DEFINING THE SUBSTANTIVE POLITICAL RIGHTS
GUIDING INTERNATIONAL LAW AS APPLICABLE TO
A CONCRETE CONFLICT RELATED BY A FOREIGN ARM-OF-WAR

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TABLE OF CONTENTS

Table of Contents

Page

Page

I INTRODUCTION

On August 5, 1945 the United States of America dropped the first atomic bomb on Hiroshima, Japan. This event plunged the world into a new era in which massive destruction through atomic fission could be easily accomplished. Since that time humankind has been desperately attempting to evolve itself so as to be able to cope with the new environment to which his technical ingenuity has brought him. World diplomatic difficulties and international intrigues are basically no different today than those of the last few centuries. Nor has mankind appreciably evolved during this period. Yet his ability to apply knowledge to his benefit and, more terrifying, to his own obliteration, has sent him searching for an effective means to develop a world order system capable of preventing his own destruction.

Unfortunately, no ready formula exists. Nor does it appear that once it is found it will be capable of immediate application. A slow transition is inevitable. During this stage of evolution, rules and a means of enforcement are necessary to prevent the machinations of men and nations from completely destroying the civilization it has taken so long to

1 INTRODUCTION

develop. Only law, especially the science of international law, can form the keystone upon which we can successfully complete the odyssey. The prize is more than peace, it is existence. The perils comprise more than the horrors of war and economic waste but promise total obliteration.

The world is divided into two ideological camps. The one maintains that the economic and political structure of its society should be determined by the will of all the people as much as possible for an orderly society. The other adopts an ideology which claims that the avaricious tendencies of men by their nature create strata of society thereby providing oppression and injustice, and until the ultimate economic state of perfect and equal sharing of resources is reached the State must completely control socieity to achieve the destruction of all strata of society. The United States leads the "free" nations as it is at present the greatest economic and political State of that bloc of nations. The other is represented by the Union of Soviet Socialist Republics, also a military super-power. Both States are nuclear giants as well, and between them have the capability of destroying the planet they both share.

Since the conclusion of the Second World War historical developments have created a confusion of political and economic entanglements which have placed the world on the brink of nuclear obliteration. Although these monolithic States have

ultimately begun to appreciate the vast destructive force each has at its disposal and now attempts to establish means by which it can prevent an accidental destruction of civilization, the third world, comprising over one hundred new and weaker states, is continually in flux as each vies for advantage and influence. The result is a game of Russian roulette where the international commitments of these nuclear giants, both of which desire to win over to their side the uncommitted nations, are forced to move and counter move and continually escalate international pressures in an effort to maintain a balance of power.

The struggle between the giants for nuclear superiority led them to ignore the danger inherent in the spread of weapons of mass destruction to other States. In 1968, only after at least three other States have developed the capacity to manufacture and deliver nuclear weapons, have the United States and the U.S.S.R. agreed on a Nuclear-Non-Proliferation Treaty. This could well be too little and too late since France and Communist China, both of whom possess nuclear weapons, have refused to become parties to the Convention as have the other States such as Israel and West Germany--who have the capability of manufacturing such weapons systems. The threat of a nuclear holocaust initiated from Nations other than the United States or the U.S.S.R. is a reality both States must consider in the conduct of their international relations.

Nevertheless these great States, knowing the risk of war, are compelled to continue developing more powerful weapons in an attempt to remain at least partially invulnerable to an attack against them. Both States have secret services which conduct intelligence-gathering operations, whether overt or covert, so that they may each remain as completely informed as possible about the other side. And each is required, often unwillingly, to fully live up to its agreements and alliances, such as in the case of the war in Viet-Nam, to demonstrate its strength and resolve to maintain its honor and purpose.

Both States, as part of their intelligence-gathering operations, use their warships, among other devices, to gather information regarding the operations of the other camp. The United States has taken the position that intelligence ships, especially when they are foreign warships, are immune from seizure or, in fact, any interference on the high seas.[1] Soviet intelligence ships regularly take station in South Korean waters, the waters off the coast of Viet-Nam, and at the United States Air Base in Guam. They are also stationed off the harbors of San Francisco and Charleston, South Carolina, observing the movement of the nuclear submarines of the United States.[2] These vessels have not been interfered with, although they remain under surveillance.

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[1] Dep't. State Bull., LVIII (Feb. 12, 1968), p. 197.

[2] Id., p. 189.

The seizure of the Pueblo brought a new dimension into international law. The modern world, with its rapid means of transportation and communications, abetted by weapons systems capable of swift and terrifying world obliteration, adds greatly to the difficulty of attaining and maintaining minimum world public order. Today it is no longer possible to enforce international law unilaterally and the application of military force, even by a super-state against a much weaker nation, is a decision only the most foolhardy would embrace without careful reflection.

Yet it would be irrational to allow the public order of the oceans to be destroyed for lack of effective sanctions.

This study will examine, using a detailed analysis of the Pueblo incident as an example, the alternatives available to competing state interests in the use of the world's oceans for self-defensive intelligence-gathering where these rights conflict with rights of a state to guard against attack and subversion, recommending a solution which can most easily fit into our present world public order system in such a manner that an optimum level of freedom in the use of the world's seas may be maintained at a minimum risk of world annihilation. The importance of an immediate, practical solution, short of war, in the seizure of a foreign warship rests in the fact that a future solution under an improved world

order system is of little value when the hazard of nuclear obliteration from such activities is a current fact. This study will be more timely if a presently valid solution capable of immediate implementation in an existing world order system is proposed, rather than finding a solution which will depend upon the happening of a number of fortuitous events prior to its becoming a valid answer to a present problem.

II HISTORICAL BACKGROUND

A. Coercive Situation in Korea

1. The Korean War Era.

At the end of the Second World War Japan was dispossed of Korea, which was then occupied in the north by the U.S.S.R. and in the south by the United States. Kim Il Sung headed the Communist North and the United States created a democratic government in South Korea. The Russians not only fought against the establishment of such a government, but vetoed her admission into the United Nations when she failed in her main objective. American troops withdrew in June 1949 amid speculation that a relatively strong North Korean, Russian-trained, army would descend on the relatively weak Republic of South Korea. Nevertheless, Secretary of State Acheson stated that South Korea was not within the United States defense perimeter.[3]

On June 25, 1950 that which was so much feared occurred. At approximately 4:00 A.M., local time, the bombardment began. North Korean troops invaded the South at eight o'clock in the

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[3] T. A. Bailey, A Diplomatic History of the American People (New York: Appleton-Century Coofts, 7th ed., 1964), p. 819.

II. DIPLOMATIC BACKGROUND

A. Communist Aggression in Korea

1. The Korean War Begins.

At the end of the Second World War Korea was liberated from Japanese rule, which was then occupied in the north by the U.S.S.R. and in the south by the United States. When it came time for the Communist north and the United States withdrew from Korea, they left behind a Communist government in North Korea. The withdrawal not only caught against the establishment of such a government, but reduced her economic ties with United States which was Korea's main objective. American economic planners in Japan felt that economic-planners, many would disagree on the relatively small economic significance of South Korea. Nevertheless, Secretary of State Acheson stated that South Korea was not within the United States defense perimeter.[1]

On June 25, 1950 when enemy was on most Central Command, 38 approximately 43rd U.S. Tenth Army, the Communists began North Korean troops (armed and trained by Army officers in the

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1. A. Millis, A Collective History of Communism People Like Soviet Intervention-Security Secret, The U.S., 1951, p. 314.

morning and two hours later a declaration of war was broadcast by the North Korean Government.[4] The United Nations Security Council met in an emergency meeting at Lake Success and by a 9-0 vote (Yugoslavia abstaining) found North Korea guilty of breaking the peace. It demanded that the North Korean Government pull back its troops to the 38th parallel.[5] The representative of the U.S.S.R. did not vote. That delegation was boycotting all United Nations proceedings in protest against its failure to accept the delegation of Communist China in the seat of the Security Council occupied by the Nationalist Chinese representative. In the balance against ignoring the invasion of South Korea by the Communist North rested not only the probability of a new world conflagration but, more important, the very existence of the United Nations as an effective instrument for maintaining the peace and security of the world. While the United States was urging intervention by the United Nations she began, independently, to rush arms and military assistance to the embattled South Korean regime.[6] When North Korea ignored a second United Nations order for withdrawal, the Security Council authorized its member nations to use armed force in repelling the invasion of South Korea and restoring international peace and security.[7]

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[4] N.Y. Times, June 25, 1950, at 1, col. 1.

[5] Id., June 26, 1950, at 1, col. 8; [6] Id., col. 7.

[7] Id., June 28, 1950, at 1, col. 2.

meeting and two hours later a declaration of war was broadcast by the North Korean government.[4] The United Nations Security Council met in an emergency meeting at 1400 Eastern and by a 9-0 vote (Yugoslavia abstaining) condemned North Korea's act of breaking the peace. It demanded that the North Korean government pull back its troops to the 38th parallel.[5] The representatives of the U.S.S.R. did not vote. Some delegation was boycotting all United Nations proceedings in protest against its failure to accept the declaration of Communist China in the seat of the Security Council occupied by the Nationalist Chinese representatives. In the Defense Against Invasion the invasion of South Korea by the Communist World created not only the probability of a war-wide conflagration but, more important, the very existence of the United Nations as an effective instrument for maintaining the peace and security of the world. While the United States was urging intervention by the United Nations she decided, independently, to take more military assistance to the Korean-Syngman regime.[6] When South Korea ignored a United Nations order for withdrawal, the Security Council authorized its member nations to use armed force in repelling the invasion of South Korea and restoring international peace and security.[7]

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[4] Cf. Glueck, June 25, 1950, 25 A, col. 1.

[5] Id., June 26, 1950, 25 A, col. 3; [illegible], col. 1.

[6] Id., June 29, 1950, 25 A, col. 2.

President Truman appointed General MacArthur to command United States forces in Korea pursuant to the United Nations authorization. The British Government placed its Pacific Fleet under General MacArthur's command, as did Australia and New Zealand, on June 25, 1950.[8] President Truman, however, made it clear that the United States was not at war, stating that this was a police action for the United Nations against an "unlawful bandit attack on the South Korean Republic."[9] His position was further enforced when the United Nations authorized the United States to form a Unified Command with General MacArthur as Supreme Commander, and permitted that Command to use the United Nations flag.[10]

The fighting continued for over three years. The first meeting for armistice talks began at Kaesong on July 10, 1951, but a truce was not declared until the signing of the armistice agreement on July 27, 1953.[11]

2. The Events Following the Armistice.

The truce ended the fighting between the United Nations and the North Korean Government. It failed to settle any of the issues. The governments of both halves of Korea were, as ever, determined to reunite Japan's former possession. In

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[8] N.Y. Times, June 29, 1950, at 1, col. 2.

[9] Id., June 30, 1950, at 1, col. 5.

[10] Id., July 9, 1950, at 1, col. 5.

[11] Id., July 27, 1953, at 1, col. 8, and 6, col. 5.

1954, the United States Air Force reported that the North Koreans attacked an RB-45 aircraft over neutral waters.[12] Soon thereafter followed the seizure of two Canadian soldiers in the neutral, demilitarized zone by North Korean troops.[13] In August 1955 the South Korean Government charged that the North Koreans were floating anti-personnel bombs down the Han River estuary, culminating in thirteen explosions which caused six deaths and seven injuries to civilians.[14] Incidents continued through 1955 and 1956. In June 1957 the United Nations Commissioners advised the Communists that due to the rearmament of the North Korean Army, it would no longer be bound by the truce provisions requiring the maintenance of the status quo ante regarding weapons and would rearm the South Korean Army with modern weapons.[15] Repeated violations of the 1953 truce were also cited.

Seizures of fishing vessels, murders, ambushes, and various other terrorist tactics, in unending repetition, continued through the remaining Fifties and early Sixties. The peace treaty, the difficult goal of the 1950's, became a virtual impossibility as the 1960's became history.

By 1967 ambush and infiltration activities by North

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[12] N.Y. Times, Feb. 1, 1954, at 1, col. 2.

[13] Id., Mar. 18, 1954, at 3, col. 5.

[14] Id., Aug. 7, 1955, at 14, col. 1.

[15] Id., June 21, 1957, at 1, col. 5.

1934, the United States Air Force reported that the Soviet Caucasus attached an 89-43 mirrors over doubtful waters.[12] Soon thereafter followed the matters of the Canadian soldiers in the neutral, demilitarized zone by North Korean troops.[13] In August 1953 the South Korean government charged that the North Koreans were fishing anti-personnel boats down the Han River estuary, violations in thirteen separate waters caused six deaths and seven injuries to civilians.[14] Hostilities continued through 1955 and 1956. In June 1957 the United Nations Commissioners advised the Communists that due to the treatment of the North Korean Army, it would no longer be bound by the truce provisions regarding the maintenance of the status quo ante regarding weapons and troops. Eastern and South Korean Army with modern weapons.[15] Repeated violations of the 1953 truce were also noted.

Deletion of fishing vessels, aircraft, economic, and various other corporate tactics, in addition reparation, continued through the remaining fifties and early sixties. the peace treaty, the artificial peak of the 1960's, became a virtual impossibility as the 1960's became history.

By 1967 Soviet and infiltration activities by North

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[12] C.T. Times, Dec. 1, 1974, at 1, col. 3.

[13] Id., Mar. 16, 1954, at 3, col. 6.

[14] Id., Aug. 7, 1959, at 12, col. 1.

[15] Id., June 21, 1957, at 1, col. 6.

Korea were reported to be on the increase and two supply trains were sabotaged in September.[16] In the same month North Korea charged that South Korean warships were violating her territorial seas. She also fired upon and sank a South Korean fishing vessel.[17] On January 22, 1968 The New York Times reported that thirty-one infiltrators had entered South Korea on an unsuccessful mission to assassinate the South Korean President.[18]

B. The Pueblo Incident of January 23, 1968

1. The Factual Account.

At approximately 12:00 P.M., Eastern Standard Time, on January 23, 1968, naval vessels of the North Korean People's Democratic Republic surrounded the United States naval vessel PUEBLO (AGER-2) which was at that time cruising off the coast of North Korea, boarded her, capturing her crew, and took her into the port of Wonson on North Korea's eastern coast.[19] The incident began approximately two hours earlier when a North Korean coastal patrol boat approached the Pueblo and, using international signals, first requested the ship's nationality, and then ordered the Pueblo to "Heave to or (it would) open fire." Pueblo replied that it was in international waters.[20]

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[16] N.Y. Times, Sept. 14, 1967, at 21, col. 1.

[17] Id., Sept. 22, 1967, at 3, col. 2.

[18] Id., Jan. 22, 1968, at 3, col. 3.

[19] Id., Jan. 24, 1968, at 1, col. 8; [20] Id., at 15, col. 1.

The patrol boat continued to circle the Pueblo. Three other patrol craft belonging to the North Korean Navy joined their sister-ship and the four of them surrounded the Pueblo, closed in and boarded her. The actual boarding occurred at 1:45 P.M.[21] A few shots were fired across the Pueblo's bow. The New York Times reported, based on the testimony at the Navy investigation of the incident, that Captain Bucher was injured and a Fireman named Hodges was killed when one of the Korean vessels' missiles penetrated the Pueblo's superstructure, causing loose metal fragments to fly about the vessel.[22]

2. The Issue of Location.

Claims by the United States:

The United States Department of Defense reported that the Pueblo was boarded 25 miles off the coast of North Korea.[23] The reported position of the Pueblo at the time of the boarding was 127°54.3'E; 39°25'N.[24]

The United States took a strong official position; President Johnson, in a speech given on the twenty-sixth of January, saying in part ". . . . This week the North Koreans

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[21] N.Y. Times, Jan. 24, 1968, at 1, col. 6.

[22] Id., Jan. 23, 1969, at 1, col. 7.

[23] Id., Jan. 24, 1968, at 1, col. 8.

[24] Id., at 14, col. 5. Although this position was later revised to 16 miles off the North Korean coast, both positions were beyond the 12-mile limit of territorial waters claimed by North Korea.

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[11] U.S. Times, Jan. 24, 1964, at 1, col. 6.

[12] Id., Jan. 23, 1964, at 1, col. 7.

[13] Id., Jan. 23, 1964, at 1, col. 8.

[14] Id., at 12, col. 1. Although this position was later retained by 11 votes out the South German Comm., both countries were beyond the 11-mile limit as territorial waters claimed by nearby ports.

committed yet another wanton and aggressive act by seizing the American ship Pueblo and its crew in international waters. Clearly this cannot be accepted."[25] Secretary of State Dean Rusk declared that the United States was determined to get the Pueblo back ". . . by whatever means it takes."[26] And, in a speech before the Brooklyn Cathedral Club in New York City on January 25, Secretary Rusk emphasized ". . . . The seizure of a United States naval vessel in international waters is without precedent and is intolerable. And there can be no satisfactory result, short of prompt, may I say immediate, release of that ship and its officers and crew."[27]

This was followed by a statement in the United Nations by Ambassador Goldberg, our then representative to that international organization, which clearly stated the position of the United States:

> ". . . . The strict instructions under which the Pueblo was operating required it to stay at least thirteen nautical miles from the North Korean coast. While my country adheres to the three-mile rule of international law concerning territorial waters, nevertheless the ship was under orders whose effect was to stay well clear of the twelve-mile limit which the North Korean authorities have by long practice followed."[28]

The Ambassador alleged three points in his speech: First, that the location of the Pueblo in international waters

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[25] Dep't. State Bull., LVIII (Feb. 12, 1968), p. 189.

[26] Id.; [27] Id., p. 192; [28] Id., p. 194.

committed yet another reckless and aggressive act by pointing the American ship Pueblo and its crew in international waters, clearly into peril and jeopardy."[42] Secretary of State Dean Rusk declared that the United States was determined to get the Pueblo back ". . . by whatever means it takes."[43] And, in a speech before the Economic Club in New York City on January 25, Secretary Rusk emphasized ". . . . the seizure of a lightly armed naval vessel in international waters is without precedent and is intolerable. And there can be no satisfactory result, short of prompt, and I say immediate, release of that ship and its crew."[44]

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> ". . . . The aerial interceptions under which the Pueblo was operating required it to stay at least thirteen nautical miles from the North Korean coast. While by country adheres to the three-mile rule of international law concerning territorial waters, recognizes the ship was under orders whose effect was to stay well clear of the twelve-mile limit which the North Korean authorities have by long practice maintained."[45]

The Ambassador alleged three points in his speech. First, that the insertion of the Pueblo in international waters

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[42]"Rusk", Time mag., LXXIII:Jan. 12, 1968, p. 14a.

[43]Id.; [44]"Rusk to Club", op. cit.

was fully known to the North Korean authorities; secondly, so lightly armed was the Pueblo that the North Korean patrol vessels reported it unarmed; and third, that the Pueblo was in no position to engage in a hostile, warlike act toward the territory or vessels of North Korea and the North Koreans knew this.[29]

Ambassador Goldberg added:

> ". . . in light of the comments of the distinguished Soviet representative on the adoption of the agenda, that Soviet ships engage in exactly the same activities as the Pueblo and sail much closer to the shores of other states. And one such Soviet ship right now is to be found in the Sea of Japan and currently is not far from the North Korean shores."[30]

By February 2, 1968, the United States position as to its intended response, failing the immediate return of the crew and the vessel, had been moderately altered in that diplomatic efforts were to be used, rather than military coercion, in accomplishing the return of the ship, its officers and crew.[31] The basic claim of the United States was that under international law no nation has a right to seize a warship of another nation whether on the high seas or in territorial waters. But if a foreign warship enters territorial waters, the littoral state may require it to depart

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[29] Dep't. State Bull., LVIII (Feb. 12, 1968) p. 196.

[30] Id., p. 196; [31] Id., Feb. 19, 1968, p. 223.

was fully known to the Czech Defense Ministry; accordingly, on [illegible] when the Czech Defense Ministry requested it quickly, [illegible] was in position to engage in a hostile, warlike act toward the territory or vessels of North Korea and the North Korean Government.[39]

Ambassador Goldberg added:

> ". . . In light of the comments of the distinguished Soviet representative on the adoption of the Security Council resolution of November the same morning as the Pueblo and well ahead of the Soviet ship could close on the scene, of other matters. And one such Soviet ship could be found in the Sea of Japan and currently is not far from the North Korean shores."[40]

By February 3, 1968, the United States position as to its intended response, calling the Security Council of the [illegible] had been moderately altered in that diplomatic efforts were to be used, rather than military coercion, in accomplishing the return of the ship, its officers and crew.[41] The basic claim of the United States was that under international law no nation has a right to seize a vessel of another nation whether in the high seas or in territorial waters. But if a Security Council should determine, the [illegible] might consider it to appear

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[39] Dep't. Tech. Pub., Vital [illegible], p. 106.

[40] Id., p. 130; [41] Id., Feb. 19, 1968, p. 203.

immediately, and no more.[32]

Immediately after the incident was reported it was referred to as "a breach of international law amounting to an act of war"[33] and as "an act of piracy"[34] by two senators. Although these are not official positions of the Administration, they indicate the anger of the United States at receiving the news of the seizure.

The Claims of North Korea:

A similar analysis of the North Korean position is difficult because they not only lack a forum such as the United Nations in which to voice their claims and be subject to rebuttal, but they also tend to use news releases and the like to propagandize rather than actually attempt to bolster their international importance. When arguments against the West are expounded only for consumption in the world market of public opinion, it is almost impossible to give a fair analysis of their contents.

North Korean authorities claimed that the Pueblo had intruded into the territorial waters of the People's Democratic Republic and was carrying out "hostile activities." The Pueblo

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[32] Dep't. State Bull., LVIII, (Feb. 12, 1968), p. 302. An address given by Secretary of State Dean Rusk in which he said in part: "The most essential fact is that under accepted international law North Korea has no right to seize the Pueblo --either on the high seas or in territorial waters. The Convention on the Law of the Sea adopted in 1958, makes it entirely clear that, if any warship comes inside the territorial

[33] N.Y. Times, Jan. 24, 1968, at 1, col. 7.

[34] Id., at 14, col. 7.

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[32]Def't. Daily Bull., Xxiii, Feb. 19, 1968, p. 236. An
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international law North Korea has a right to seize the Pueblo
--either on the high seas or in territorial waters. The
connection of the ship is the one followed in 1954, unless it
truely does not, it may certainly seem their the territorial

[33]N.Y. Times, Jan. 24, 1968, p. 1, col. 7.

[34]Ibid., p. 10, col. 5.

was referred to in North Korean news releases as "an armed spy boat of the United States imperialist aggressor force."[35] The Pyongyang broadcast alleged that "while on the sea they (the United States) sent an armed vessel of the United States forces to intrude into the waters off Wonsan and perpetrate serious provocation."[36] They claimed that warnings had been broadcast to the United States to keep out of North Korean waters and that the United States armed vessel had used the cover of South Korean fishing fleets to intrude into North Korean waters.[37]

The New York Times, on April 17, 1968, carried an article stating that North Korean authorities released photographic copies of documents which they claim were seized from the Pueblo and which prove beyond doubt that the Pueblo had intruded into North Korean territorial waters and, indeed, that it had orders to do so in spite of the claims of the United States Government to the contrary.[38] Beyond this statement, no

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waters, the coastal state can require it to leave but does not have the right to seize it." It should be noted that North Korea is not a party to that Convention. Yet, considering the number of nations (49) which ratified that Convention (see U.S. Naval War College, International Law Studies 1959-60, app. J, p. 264) it could be considered by some to be generally accepted international law binding on all nations. The issue, however, is not as cut and dried as the Secretary's remarks might lead one to believe.

[35] N.Y. Times, Jan. 24, 1968, at 1, col. 8; [36] Id.

[37] Id., Jan. 27, 1968, at 28, col. 1.

[38] Id., Apr. 17, 1968, at 3, col. 3.

was released to the South Korean press releases as "an equal
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the Pyongyang broadcast alleged that "while on the one hand
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waters, the vessel also was required to leave and area not
less than five miles to which it should be ordered that North
Korea is not a party to that Convention. Yet, considering the
number of nations (90) which ratified that Convention (see U.S.,
Naval War College, International Law Situations 1972-73, pp. 9,
9. 2b1) it could be considered to have to be universally accep-
ted international law relating to all nations. The latter, how-
ever, is not to our knowledge the position of North Korea nor
Iran) can be relied.

[35] N.Y. Times, Mon. 7A, 1968, as in, col 6, [illegible].

[36] Id., Mon. 17, June, pp 2e, col. 1.

[37] Id., Mon. 17, 1968, pp 2, col. 2.

attempt was made by North Korea to prove, based on independent evidence, that her claims were valid. The documents were never released to the public. Although many questions arise as to the validity of the documents themselves or of the North Korean allegations, it will not be examined here as it is beyond the function of this paper to prove or disprove the factual evidence and circumstances which surround this incident. It remains that the North Korean Government based its actions upon the intrusion of the Pueblo into that Republic's territorial seas--a fact vehemently denied by the Government of the United States.

3. The Dispute as to the Vessel's Function.

A General Description of the Pueblo:

The Pueblo is one of a class of ships designated as Auxiliary General Electronics Research ships (AGER). Every ship of the United States Navy has a designation and category symbol to identify its purpose, function, and classification. The "A" can be said to stand for Auxiliary, as the purpose of the vessel is not to directly assist in attacking an enemy by firepower but rather to serve combatant vessels.[39] These particular vessels are equipped with highly sophisticated electronic gear and are used to gather a wide range of data on and concerning the oceans, their contents, ecology, floor and

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[39] U.S. Naval Institute, The Bluejackets Manual (17th ed., 1965), pp. 234-37.

3. The Dispute as to the Vessel's Function.

A General Description of the Problem.

The Pueblo is one of a class of ships developed as auxiliary General Electronics Research Ship (AGER). Every ship of the United States Navy has a designation and category symbol to identify its purpose, function, and classification. The "A" can be said to stand for Auxiliary, as the purpose of the vessel is not to directly contribute to military combat. These particular vessels are equipped with highly sophisticated electronic gear and are used to gather a wide range of data on and concerning the oceans, their contents, geology, floor and

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[39]U.S. Naval Institute, The Blue Jackets Manual (Fifty-ei..., (1965), pp. 131-32.

superadjacent air space. They store and examine the information acquired for use in developing knowledge about the sea and thereby expanding man's ability to use the resources of the seas. Their information can also assist the combatant vessels of the United States Navy in fulfilling its defensive functions through such research. Depending upon the sophistication and purpose of the equipment these ships can analyze radio and radar signals, gather information on ocean sounds, and a great variety of other information which may be useful to the Government of the United States. It might be added that the term "spy ship" is inaccurate and misleading, although it has been used by various commentators, newspapers, and the like to describe the vessel.

These ships were converted from United States Army diesel-powered light cargo ships (AKL) to their present naval mission--intelligence-gathering. The vessels displace approximately 906 tons of water. They measure 179 feet from stem to stern; are 33 feet abeam and have a draft of 10.2 feet. Their approximate maximum speed is 12.2 nautical miles per hour (2,000 yards). The Pueblo carried a complement of six officers, seventy-five crew members, and two civilian personnel.[40]

The New York Times reported that according to informed, but undisclosed, sources the Pueblo is crammed with various electronic and sonar listening devices and recording equipment.[41]

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[40] N.Y. Times, Jan. 24, 1968, at 15, col. 2, and Mar. 24, 1968, at 44, col. 4; [41] Id.

[illegible] and sonar listening devices and navigating equipment.[41]

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[41] N.Y. Times, Dec. 24, 1939, at 12, col. 2, and Dec. 24, 1939, at 24, col. 4; 12 [illegible].

A substantial amount of the equipment was used to collect military intelligence information. The ship allegedly had the capacity to intercept submarine messages, and record the sounds of Russian submarines. It also had the capability to locate the positions of land-based radar equipment and measure the wave lengths. This would permit attacking aircraft, by duplicating the wave patterns of a radar net, to remain undetected until it is too late for the defensive apparatus of the nation being attacked to effectively mobilize against the approaching menace. This class of vessels also carries computers to analyze data. It is important that these ships approach as close to the source of the waves being examined as is possible, in order to get an accurate record of the wave patterns and sounds.[42]

Claims-by-the North Korean Government:

In the propaganda statements of the People's Democratic Republic of North Korea, that Government accused the United States of directing the Pueblo to engage in hostile activities within eight miles of the North Korean coast--against its people.[43] These activities consisted in gathering information and electronic data from North Korea's communications and

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[42] N.Y. Times, Jan. 26, 1968, at 10, col. 1, and at 15, col. 2.

[43] Id., Jan. 24, 1968, at 15, col. 2.

defensive radar installations.[44] The Pueblo was also charged with gathering information on the characteristic noise patterns of Soviet submarines as well as data regarding the ocean floor adjacent to the territorial waters off the North Korean coast.[45]

North Korea claimed that such activities constituted spying, and alleged that this activity was aggressive. These amounted to acts so hostile that the seizure was justified as the only effective means to prevent serious injury to the people of North Korea.

Claims by the United States Government:

The United States Government officials stated that the Pueblo was not a "spy ship" in the sense that its purpose was to intrude in North Korean waters in order to carry out espionage activities. Its objective, rather, was to remain well outside of what the North Koreans claimed as their territorial seas, to carry on a surveillance of radar and radio waves, and to record "underwater sound" as well as to gather hydrographic data.[46] It was officially acknowledged that the Pueblo carried highly-classified electronics equipment for intelligence-gathering purposes.[47] The United States position,however,is that

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[44] N.Y. Times, Apr. 17, 1968, at 3, col. 3.

[45] Id., Mar. 24, 1968, at 44, col. 4; [46] Id.

[47] Id., Jan. 24, 1968, at 14, col. 8.

defendants below incredible.[44] The Pueblo was also criticized with practically information on the shakedown cruise of Soviet submarines as well as those regarding the ocean floor adjacent to the restricted waters off the north Korean coast.[45]

North Korea claimed that such activities constituted spying, and alleged that North Activity was provocative. These accusations in turn, were the evidence used to justified the only effective means to prevent serious injury to the people of North Korea.

Status of the United States Government:

The United States government officials insisted that the Pueblo was not a spy ship. In the words that its purpose was to increase its data with regard to China to carry out reconnaissance activities. The objective, rather, was to examine with extreme of what the North Koreans claimed as their territorial seas, to carry on a investigations of radio and radio relay, and to record "underwater sound-in as well as to obtain oceanographic data.[46] It was officially announced that the Pueblo carried highly-classified electronic equipment for intelligence-gathering purposes.[47] The United States position, however, in that

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[44] N.Y. Times, Nov. 17, 1968, p. 3, col. 3.

[45] Ibid., Dec. 24, 1968, p. 24, col. 7; [46] Id.

[47] Wall St. Journ., p. 12, col. 2.

the activity of the ship falls into that category of activity which is permissible under international law. Therefore, not only can the Pueblo not be classified as an espionage vessel but the seizure of a foreign man-of-war on the high seas is itself a violation of international law as such vessels are entitled to jurisdictional immunity.[48]

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[48] Convention on the High Seas, adopted at Geneva, April 27, 1958 (U.N. Doc. A/CONF. 13/L 53 and correction 1), signed by the United States on Sept. 15, 1958, Articles 2 and 8.

III THE CENTRAL ISSUES PRESENTED BY THE PUEBLO INCIDENT

The seizure of the Pueblo, a vessel classified as a warship, under international law of the sea, created new problems for the nations of the world and brought to the fore the need to either eliminate intelligence gathering by warships and military aircraft as is presently practiced by the United States and the Soviet Union or, in the alternative, establish a regime by which such activity may be pursued without the risk of a major confrontation perpetrated by a relatively small nation with substantially less to lose than the great world powers.

Since the elimination of such activities is remote indeed, this being reconfirmed by the downing of a United States Naval intelligence-gathering aircraft on April 15, 1969 at the hands of North Korea,[49] and its aftermath,[50] it is imperative that legal issues be examined and understood so that the world community can act appropriately and effectively to maintain a peaceful world order in the face of present world tensions.

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[49] The Washington Star, Apr. 15, 1969, at 1, col. 8.

[50] Id., Apr. 18, 1969, at 1, col. 3.

III THE CENTRAL ISSUES PRESENTED BY THE PUEBLO INCIDENT

The seizure of the Pueblo, a vessel identified as a warship, under international law of the sea, created new problems for the nations of the world and brought to the fore the need to either eliminate unnecessary jeopardy by warships and military aircraft on the peaceful pursuits by the United States and the Soviet Union or, in the alternative, maintain a region by which such activity may be pursued without the risk of a major confrontation precipitated by a relatively small reaction into unnecessarily tense to some then the peace would prevent.

Since the elimination of such activities is remote indeed, this being evidenced by the downing of a United States naval intelligence-gathering aircraft on April 15, 1969 at the cause of world tension[20] and its aftermath,[21] it is imperative that legal issues be examined for understood to what the world community can appropriately and effectively to maintain a peaceful world order in the face of present world tensions.

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[20]The New York Times, Apr. 15, 1969, at 1, col. 8.

[21]Id., Apr. 16, 1969, at 1, col. 8.

The principal issues of this study are two: First is whether a nation can legally pursue intelligence-gathering activities under the existing world public order system and within the framework of international law, most directly current international law of the sea, without becoming an aggressor state whose activities constitute a threat to or a breach of the peace under the law of nations. The second question is whether a state, under international law, should be allowed to interfere with the reconnaissance mission of a foreign state's warship which is attempting to acquire information regarding that state's defensive and offensive capabilities. Assuming some response is proper, what is the most appropriate means and by what proportionate sanctions may the minimum world public order system be maintained in adjusting the injustices arising from this clash of mutually-exclusive values?

In order to answer these principal issues many preliminary and corollary questions must be answered so that a solution may be effectively and meaningfully reached. The applicable principals of international law of the sea and their development relevant to this dispute must be examined. Since the Pueblo Incident is being used for the focal point of this paper, the interrelationship between the United States of America and the People's Democratic Republic of Korea must be analyzed. Next must follow an inquiry into whether the acts of the parties immediate to the Pueblo incident had basis in international law as it exists for state actions and, if not,

at what points international regulation breaks down in the face of such crises and where augmentation is required.

Finally, an attempt will be made to find a practical solution to these crisis situations in an effort to give the parties guidance and a satisfactory option to war, either by action or by imposing a legal obligation to refrain from specific types of action in order that a minimum world public order system can be maintained in the face of any future crises similar in nature to that of the Pueblo seizure of January 1968.

IV THE APPLICABLE GENERAL INTERNATIONAL LAW OF THE SEA

A. The Concepts of Sovereignty and Jurisdiction

Sovereignty is a high degree of formal authority, virtually independent of other earthly authority. Sovereignty rests in entities called states and is manifest by the power to make laws and to rule. Sovereignty is independent within each state but is limited without the state by the rights of other sovereign states. Conduct between sovereign states is thus regulated through what is known as the "Law of Nations," manifest as frequently in its breach as in its observance.[51] All independent political entities on this planet are considered to be sovereign and--together with three other qualities--a community of people settled and living together in a defined geographical area, ruled by a person or group of people under the law of the land, comprise nation-states.[52] Due to the inter-relationships of a world made smaller by

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[51] H. Lauterpacht, Oppenheim's International Law, Vol. 1 (8th ed., 1957), pp. 118 and 122-23.

[52] Id.

IV. THE APPLICABLE GENERAL INTERNATIONAL LAW OF THE SEA

A. The Concepts of Sovereignty and Jurisdiction

Sovereignty is a high degree of legal authority, virtually independent of other earthly authority. Sovereignty rests in certain natural rights that are enjoyed by the people to make laws and to rule. Sovereignty is independence within each state but is limited without the state by the rights of other sovereign states. Common customary sovereign rights thus regulated through what is known as the "law of nations," manifest as freedoms in the broad as in its observance. All independent political entities on this planet are considered to be sovereign non-colonies with three basic rights--a community of people, settled and living together in a defined geographical area, ruled by a person or group of people under the law or the land, effective national control due to the interrelationships of a social web resulting by

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[1]E. Lauterpacht, Oppenheim's International Law, Vol. 1 (8th ed., 1955), pp. 119 and 120-2.

[2]Id.

the ever-advancing technological developments in the fields of communication and transportation, together with the complexities of a developing world economic structure, we find that --to borrow an Orwellian phrase--some states are "more equal than others" in fact, despite the international concept of equal states. Nevertheless, within the territory of each state, its government possesses the supreme authority to rule its citizens as it deems most advantageous for its social structure.

Jurisdiction is the term traditionally used to describe the area within which a state is competent to exercise its sovereignty by enforcing its policy therein.[53] For example, a state's competence to apply its policy to foreign vessels in its territorial sea would be an exercise of sovereignty. A state's jurisdiction is, in turn, subject to certain extensions and limitations under international law. At this point they will be referred to only briefly. Every state is entitled by international law to claim extraterritoriality--exemption from local jurisdiction from other states for visiting heads of state, its diplomatic envoys, its men-of-war, and its armed forces.[54] At the same time, the Law of Nations permits a state to exercise jurisdiction over its subjects

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[53] M. S. Mc Dougal and W. T. Burke, The Public Order of the Oceans (1st ed., 1965), p. 182.

[54] Oppenheim-Lauterpacht, op. cit., p. 327.

the ever-accelerating technological developments in the fields of communication and transportation, together with the complexities of a developing world economic structure, do tend more --to border on unreality than ever before--some states are "more equal than others". In fact, despite the international ambiance of equal rights. Nevertheless, within the hierarchy of each state, the government possesses the supreme authority to rule its citizens as it deems most advantageous for its security and interests.

Extradition is the term traditionally used to describe the case wherein a state is compelled to surrender its sovereignty by executing its policy therein.[3] For example, a state's compulsion to apply its policy to foreign nationals in its territorial sea would be an exercise of sovereignty. A state's jurisdiction is, in turn, subject to certain reservations and limitations under international law. At this point they will be referred to only briefly. Every state is entitled by international law to claim extraterritoriality--exemption from local jurisdiction from which exempts its visiting heads of state, its diplomatic envoys, its warships, and its armed forces.[4] At the same time, the law of nations permits a state to exercise jurisdiction over its subjects

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[3] E. D. Dickinson and W. S. Carter, The Execution of the Penal Laws (1st ed., 1926), p. 120.

[4] Brierly-Waldock, op. cit., p. 217.

traveling abroad, within its own territory, since this right is based on the individual citizen and his allegiance to his state.[55] Delimitation of the right to exercise jurisdiction as well as the requirement to restrain it has developed historically through treaty and custom and, it might be said, has placed limitations on the sovereignty of nation states in their attempts to find a means to work together.

B. State Territory and the World's Seas

1. State Territory.

The territory of a state consists of the land mass over which its government holds control and exercises its jurisdiction: the waters within the state, and those immediately adjacent to it in the situation where a state borders on the seas of the world, these being designated "internal waters." Other areas of the ocean adjacent to the external waters and the airspace above extending at least as high as manned aircraft can fly, are also subject to the jurisdiction of the adjacent state.[56] The importance of state territory rests in the fact that within this geographical area government jurisdiction and state sovereignty are virtually complete and no other political power can exercise authority within that physical delimitation.[57]

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[55]Oppenheim-Lauterpacht, op. cit., p. 330.

[56]Id., p. 460; [57]Id., p. 452.

The various strata of jurisdiction which a state may exercise to varying degrees is extremely important in order to treat this subject properly, and will be thoroughly dealt with immediately below. It is necessary and appropriate to introduce, at this point, the ultimate extent of state territorial sovereignty into the seas applicable to states littoral to the world's oceans.

2. The Open Seas.

The Open Seas comprise all the salt water surfaces of the globe which are connected, from a navigational standpoint, to the globe's great bodies of water; are susceptible to international surface navigation and fishing; and which do not fall within the categories of "internal waters," "maritime belts," or other specialized zones claimed by states littoral to the open seas and recognized de facto or de jure by other nations of the world. For example, the Aral Sea in Russian territory or the Great Salt Lake in the United States cannot be classified as open seas. The Chesapeake Bay, although navigable from the Atlantic, falls within the category of "internal waters" as an historic bay and thus is not part of the open seas.

The principle of "freedom of the seas" can be traced from antiquity, although from the Middle Ages throughout the nineteenth century various states claimed vast areas of the

world's oceans.[58] Freedom of the seas was most successfully urged by Hugo Grotius in his thesis "On the Freedom of the Seas,"[59] first published in 1633. His basic proposition, one which is now universally recognized--in principle at least--declared that "that which cannot be occupied or which has never been occupied can be no one's property and that which is constituted in such a manner that although serving one person, it still suffices for the common use . . . ought to remain in perpetuity in the same condition (regarding its property right states) as when it was first created by nature."[60]

Although Grotius' proposition might be considered as making the seas a "no-man's-land" respecting the jurisdiction of states, this is not accurate. Basically, "freedom of the seas" means that no single nation or group of nations can restrict the use of the high seas to specified participant states for particular uses by legislative fiat or force of arms. Nevertheless, the sea is subject to the Law of Nations as the rule prohibiting exercise of sovereignty demonstrates.[61] The United States throughout her history

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[58]Oppenheim-Lauterpacht, op. cit., p. 582 et seq.

[59]H. Grotius, On the Freedom of the Seas (R. Magoffin transl., New York: Oxford Univ. Press, 1916).

[60]Id., p. 27.

[61]Oppenheim-Lauterpacht, supra note 51, at 589-90.

has always maintained, with one exception,[62] freedom of the open seas for fishing, commerce, and navigation.

The Convention on the High Seas, adopted by the Geneva Conference on the Law of the Sea in 1958,[63] specified four activities in which all states may engage without interference or restriction by other states. These four "freedoms," as they are called, include: navigation; fishing; laying

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[62]This one exception occured in an effort by the United States to prevent the pelagic sealers from exterminating the great herds of fur-bearing seals. By the efforts to acquire these pelts beyond United States jurisdiction, Canadian and British sealers were slaughtering the herds at sea as they approached their breeding grounds in the Pribilof Islands. The herds estimated at 4 million dwindled to 100,000 by 1910, immediately prior to the North Pacific Sealing Convention. In 1886, the United States claimed virtual complete jurisdiction over a vast area of the North Pacific Ocean extending south from its Alaskan territory, and proceeded to seize foreign sealing vessels in an effort to save the seals. A few years prior to this, when Alaska was part of the Russian Empire, the United States and Great Britain had vigorously objected to similar attempts at oceanic jurisdiction in the same area by Russia, who desired it for security and exclusive fishing purposes. (See T. A. Bailey, supra note 3, at 410 et. seq.) The United States jurisdictional claims were submitted to arbitration where they were defeated in favor of the principle of freedom of the seas. The seals were ultimately saved by means both diplomatic and legislative. (See Oppenheim-Lauterpacht, supra note 51, at 620 et. seq.)

[63]Adopted by the Conference on April 27, 1958, U.N. Doc. A/CONF. 13/L. 53 and correction 1. (See U.S. Naval War College, supra note 32, app. B, at 203 et seq.)

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[63] Convention on the Continental Shelf, 1958, U.N. Doc. A/Conf. 13/L. 55 and corrections 1. (See 9.3. Naval War College, supra note 22, sec. 4, at 202 et seq.)

submarine cables and pipelines, and overflight.[64] As this Convention implies, the high seas are subject to the jurisdiction of states in some forms

With some variations, jurisdiction on the open seas is based on the maritime flag and therefore the law of the state is applicable to and enforceable against the vessels, persons, and property sailing under that state's maritime flag while they are navigating the high seas.[65] While on the high seas private vessels are treated as though they are floating portions of the flag state, as long as they remain under the exclusive jurisdiction and control of the flag state.[66] Thus crimes committed aboard such vessels; births, deaths, marriages, and contracts entered into, while such vessels are on the high seas, are subject to the laws of the flag state.

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[64] Convention on the High Seas, art. 2. See note 63 supra. See also McDougal and Burke, supra note 53, at 751 et seq., and at 84, note 188, where examples of other freedoms of the seas such as the right to use the oceans for military maneuvers and the testing of various weapons are cited to point out that the "four freedoms" cited in the Convention are too restrictive to be a complete listing recognized as generally applicable international law. Since the freedoms of the high seas include any uses which do not interfere unreasonably with the rights of others to use the same seas for the same or other purposes, it is reasonable to assume that intelligence-gathering by vessels in the open seas must be regarded as acceptable conduct under the doctrines of the international law of the sea.

[65] Oppenheim-Lauterpacht, supra note 51, at 594.

[66] Id., at 597.

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[64] Convention on the High Seas, art. 2. See note 63 supra. See also Colombos and Smith, supra note 13, at 711 et seq., and 58 A. JUR 1HH, where examples of crimes done of the seas such as can right be now why oceans for military maneuvers and the casting of various weapons are cited to point out some the "four freedoms" cited in the Convention are not restricted to be a useful liberty recognized as generally applicable international law. Since the freedoms of the high seas include any uses which do not interfere unreasonably with the rights of others to use the seas such for the purpose of other purposes, it is reasonable to assume that jurisdiction-whether by treaty in the open seas may be exercised as exceptions customary under the operation of the international law of the sea.

[65] Lauritzen-Rasmussen, supra note 13, at 194.

[66] Id., at 197.

In addition, every maritime state, by customary international law, may punish pirates and seize their vessels, wherever found, although they must receive a trial in and according to the laws of the capturing state.[67] Warships of all countries have certain rights to pursue and search foreign merchant ships on the high seas in addition to the rights to suppress piracy and slave trade.[68] Although seizure for piracy is permitted by the Convention on the High Seas[69] it may only be carried out by warships, military aircraft, or other ships or aircraft on government service expressly authorized to do so.[70]

The Law of Nations has customarily characterized men-of-war and other public vessels of states as floating portions of the flag state, whether on the high seas or in foreign territorial waters.[71] Article 8(1) of the Convention on the High Seas specifically exempts warships from the jurisdiction of any state other than its flag state.[72] In section 2 of the same Article a warship is defined as

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[67] Oppenheim-Lauterpacht, supra note 51, at 616.

[68] Id., at 594 et seq. See also Convention on the High Seas, art. 13.

[69] U.S. Naval War College, supra note 32 at 206-08, arts. 14-21.

[70] Id., at 208, art. 21.

[71] Oppenheim-Lauterpacht, supra note 51, at 597.

[72] U.S. Naval War College, supra note 32, at 205

In addition, every warring state, by customary international law, may punish pirates and seize their vessels, wherever found, although they must receive a trial in accordance to the laws of the capturing state.[67] Vessels of all countries have certain rights to pursue and search foreign merchant ships on the high seas in addition to the rights to suppress piracy and slave trade.[68] Although seizure for piracy is permitted by the convention on the High Seas,[69] it may only be carried out by warships, military aircraft, or other ships or aircraft on government service expressly authorized to do so.[70]

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[67] Oppenheim-Lauterpacht, supra note 51, at 618.

[68] Id., at 594 et seq. See also Comment on the High Seas, art. 12.

[69] U.S. Naval War College, supra note 11 at 324-26, cite. 14-21.

[70] Id., at 324, sec. 21.

[71] Oppenheim-Lauterpacht, supra note 51, at 597.

[72] U.S. Naval War College, supra note 11, at 326

"a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears on the Navy list, and manned by a crew who are under regular naval discipline."[73]

3. Jurisdictional Claims to "Effective Control" by States over Seas Adjacent to Their Territory.

In the case of a nation-state whose territory abuts on the open seas, its jurisdictional authority can be divided into three classifications: internal waters, mentioned above; territorial waters; and contiguous zones.

The internal waters of a state consist--besides inland lakes and rivers navigable to the sea--of harbors and bays; inlets or gulfs which are surrounded by the land of one state and the mouth of which is less than ten miles in width;[74] or is landward of the base line drawn across the mouth of the bay and conforming with the provisions of the Convention on the Territorial Seas and Contiguous Zone;[75] or which can be classified as an historic bay.[76] These areas of jurisdiction

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[73]U.S. Naval War College, supra note 32, at 205.

[74]Oppenheim-Lauterpacht, supra note 51, at 460 and 505-08.

[75]U.S. Naval War College, supra note 32, at 194-96. Note Article 7 of the Convention on the Territorial Seas and the Contiguous Zone, app. A. /Hereinafter cited as "The Convention."/

[76]Oppenheim-Lauterpacht, supra note 51, at 506.

are also referred to as national waters. Within these waters the state government has authority equal to that which it enjoys on land--with exceptions so few and minor as to be beyond the scope of this paper.

States littoral to international bodies of water exercise sovereignty over a strip of the seas extending from base lines along their coast out into the oceans for a determined number of miles. The width of the zone varies with the claims of each state, which is free within certain limits to determine the extent of its own jurisdiction. Usually this imaginary boundary (a "base line") follows the low water mark of the sea along the littoral states' shores.[77] The Convention permits an alternate means of determining the line of origin from which this zone is measured, called the "straight base line method," which was first given international legal recognition by the International Court of Justice in the Anglo-Norwegian fisheries case.[78] This strip of the seas, actually an integral part of the ocean itself, referred to as the maritime belt or territorial waters,[79] is measured in miles from the low water mark or the base line. The maximum extent of this strip is an

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[77]Oppenheim-Lauterpacht, supra note 51, at 506.

[78]U.S. Naval War College, supra note 32 at 194, arts. 4, 5 (app. A). See n. 80 infra.

[79]Oppenheim-Lauterpacht, supra note 51, at 487.

imaginary line, every point of which is parallel to its point of origin measured in miles claimed by the littoral state as the extent of its territorial seas' jurisdiction with the acquiescence of the other members of the community of nations. Hence, the extent of a state's territorial waters' jurisdiction will often be referred to as "three-mile limit," twelve-mile limit," and the like. The International Court of Justice appears to say, however, that claims to territorial seas sovereignty exceeding twelve miles are invalid.[80]

A. Historical Development of the Jurisdictional Claims to Adjacent Seas.

The concept of territorial jurisdictional claims to the waters adjacent to states littoral to the world's oceans can be seen as a parallel development to the concept of freedom of the seas. As the Middle Ages drew to a close and the European Nation-states began to emerge, international trade became significant. First, the great trading cities and later, the seafaring states, attempted to maintain their

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[80] Dicta in The Anglo-Norwegian Fisheries Case (1951 I.C.J. Reports 116). Herein the International Court of Justice accepted as conforming to international law Norway's method of drawing base lines along the seaward side of the archipelago which ran parallel to northwestern coast from which she measured her territorial waters. The result was to extend to the waters on the landward side of this archipelago Norway's regime of internal waters, which was previously considered by Great Britain at least, to be open seas. The Convention recognized this system in its provisions (arts. 4, 5).

profitable monopolies by laying claim to vast areas of the world's seas and oceans. Venice laid claim to the entire Adriatic Sea in 1269 as being within her exclusive jurisdiction, exacting tolls from all foreign ships which plied its waters.[81] The trading cities of Genoa and Pisa likewise laid claim to the Ligurian Sea.[82] To the North, the Kingdoms of Denmark and Sweden divided the Baltic between them, while England claimed sovereignty over the entire English Channel as well as to a substantial area of the North Sea.[83]

In the fifteenth century a dispute arose between the then preeminent maritime nations, Spain and Portugal, as to which parts of the world were to belong to each exclusively for exploration, colonization, and trade. It was at this time that the European monarchs were consolidating their power, and political entities known as states were becoming fully established. Also at this time the development of water-borne transport had reached a point where long sea voyages became a reality for trade and exploration and so made the sea a principal means of travel and trade. Settlement of this dispute between these two powers was attempted through the efforts of the Papacy when Alexander VI, in his papal bull "Inter Caestus," divided the world between them.

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[81] C. Bynkershoek, De Domino Maris Dissertatio (R. Magoffin transl., New York: Oxford Univ. Press, 1923), p. 15.

[82] O. Svarlien, Introduction to the Law of Nations (New York: McGraw-Hill, Inc., 1955), p. 185; [83] Id.

The Western Hemisphere, with the exception of Brazil, was given to Spain. Portugal was to have for its bailiwick those hitherto unexplored and uncolonized regions of the Eastern Hemisphere.[84] Based upon this document, Spain claimed exclusive use of the central Atlantic Ocean within which her trade routes to the New World passed. Portugal claimed a monopoly over trade with lands washed by the Indian Ocean and the islands in the Western Pacific.

England disputed Spanish claims to the New World and exclusive use of the "Spanish Main," an issue virtually decided with the destruction of Spain's Armada in 1588, while the United Netherlands fought the monopolistic claims of Portugal which conflicted with their trade with Ceylon, the Celebes Islands, and the Western Moluccas through the Dutch East India Company. For this reason Grotius published his famous dissertation "On the Freedom of the Seas."[85]

Bynkershoek, writing about eighty years after Grotius,

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[84] O. Svarlien, Introduction to the Law of Nations, p. 185, and Bynkershoek, op. cit., p. 15

[85] Grotius, supra note 59, at 7. See also A. G. Reppy, "The Grotian Doctrine of Freedom of the Seas Reappraised," 19 Fordham L. Rev., (1950), p. 243 et seq. for an excellent historical background from which originated the Grotian doctrines regarding the uses of the high seas. Mr. Reppy demonstrates that not only were the theses of Grotius never wholly accepted regarding freedom of the seas but that, with the emerging uses of the seabed, subsoil, and vertical column of the world's oceans, the Grotian doctrines will become further restricted in their scope and applicability by the practice of the states of the world.

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[84] Wheaton, Introduction to the Law of Nations, p. 129, and Hyndman, op. cit., p. 12.

[85] Martins, Pedro Lopes de, ed. Don Joao A. S. Gomes, 1g Portugal e. Rev., (1910), p. 343 et seq. for an excellent historical background from which originated the Brazilian declaration concerning the free use of the high seas. Dr. Gomes demonstrates that not only were the claims of Chile wholly unsupported regarding freedom of the seas but that, with the exception of the Argentine, Brazil, and Portugal, the colonies of the world's oceans, the doctrine therefore was imposed further established in their scope and application by the practice of the leaders of the world.

did not agree with his predecessor that the seas were completely open and incapable of occupation and ownership, but rather that they were capable of being made subject to a state's jurisdiction. He cited the case of the Mediterranean Sea in the days of a thriving Roman Empire to demonstrate that even a vast body of water could become a Mare Clausam where the dominion over the surrounding land masses coupled with uncontested occupation by powerful fleets could reduce an ocean to the possession of a single state.[86] Since ownership of the sea requires permanent occupation and exclusive, uncontested control together with the intent to own and occupy the sea, it was necessary to occupy and control the opposing land masses adjacent to the sea. Since the land adjacent to the seas represented a significant aspect of occupation of the seas, Bynkershoek concluded that some area of the open seas could be reduced to the sovereignty of the littoral state because its territory abutted the sea--even though the sea was incapable of being occupied by one state.[87] And granting the impossibility to control a vast ocean, he concluded that a lesser part of the sea could be controlled by a single state.

As early as the beginning of the seventeenth century the concept that a state could claim exclusive jurisdiction over the seas adjacent to the land mass of the state itself

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[86]Bynkershoek, supra note 81, at 49; [87]Id., at 43.

was promulgated. The distances claimed varied from 100 miles (Bodin) or 60 miles (Selden) to the limit of vision.[88] These were discussed and refuted by Bynkershoek.

Bynkershoek concluded that the proper and most reasonable delimitation should be based on the regulations for rendering honors adopted by the Estates for the Belgic Confederation which had decreed, in 1671, that foreign princes were to be saluted when their ships reached the point to which their cities' cannon could carry. The author concluded that control of the land over the sea should be no further than permanent, forceful control could be exercised.[89] This doctrine has since become known as "the cannon shot rule" and is generally accepted by the Western Maritime Powers and Japan as the three-mile limit.

The Scandanavian States never accepted "the cannon shot rule," but they contributed to the present law of the sea by developing the concept of a maritime belt. After Greenland was rediscovered in the seventeenth century the King of Denmark claimed a Mare Clausam, extending through the Northern Atlantic between Greenland and Norway and Denmark. Danish licenses to fish in these waters always excepted a belt of water around the Danish possessions there--Iceland and the Faeroe Islands.[90]

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[88] Bynkershoek, supra note 81, at 43.

[89] Id., at 44. But see M. W. Mouton, The Continental Shelf, p. 192 et seq., where he alleges that "the cannon shot rule" never existed.

[90] H. S. Kent, The Historical Origins of the Three Mile Limit, 48 A.J.I.L. (1954), p. 537 et seq.

was promulgated. The distances claimed varied from 100 miles (Sweden) or 60 miles (Belgium) to the limit of vision.[88] These were discussed and refuted by Bynkershoek.

Bynkershoek concluded that the proper and most reasonable delimitation should be based on the regulations for conducting powers adopted by the Estates for the Belgic Confederation which had decreed, in 1671, that foreign princes were to be saluted when their ships reached the ports to which their circle' cannon could carry. The author concluded that control of the land over the sea should be no further than permanent, forceful control could be asserted.[89] This doctrine has since become known as "the cannon shot rule" and is generally accepted by the Western Powers and Japan as the three-mile limit.

The Scandinavian states never accepted "the cannon shot rule," but they contributed to the present law of the sea by developing the concept of a maritime belt. Often overlooked rediscovered in the seventeenth century the King of Denmark claimed a Mare Clausum,extending through the Northern Atlantic between Greenland and Norway and Denmark. Denial likewise in their waters always accepted a belt of water around the Danish peninsula there--Iceland and the Faeroe Islands.[90]

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[88] Symmons, Effect note 81, at 43.

[89] Id., at 44. See also G. Scelle, The Continental Shelf, p. 102 et seq., where he alleges that "the cannon shot rule" never existed.

[90] C. Gent, The Territorial Waters of the Polar Seas Arctic, 2d A.C.I.S. (1961), p. 231 et seq.

These maritime belts varied in width throughout the seventeenth and eighteenth centuries, as Denmark considered necessary for effective enforcement, but were fixed at four leagues during the reign of Christian V in 1682 where they remained until 1836.

These Danish maritime belts were likewise used as neutrality zones during the various wars of this era between France, England, and Holland. France attempted to obtain Danish and Swedish recognition of a three-mile limit as it was the probable maximum range of cannon. This was never specifically accepted. Gradually, a one-league neutrality zone became the acknowledged limit along the Danish coasts.

During the Seven Years War between France and England, Sweden adopted (1758) a three-mile neutrality zone in which no hostilities of any kind were permitted.[91] This distance, probably adopted in deference to France, was increased to four miles in 1779 to conform with the Danish neutrality belt. In 1836 a Danish ordinance adjusted the fishing zone to one marine league around the coast of Iceland.

It was during the early nineteenth centure that "the cannon shot rule," advocated by France, and the concept of the maritime belt, used by the Scandanavian countries, melded into the modern conception of a three-mile belt of territorial seas as we understand it today.

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[91]H. S. Kent, "The Historical Origins of the Three Mile Limit," 48 A.J.I.L. (1954), p. 550.

these articles have varied in width somewhat with advancement and enlightened contrivance, as Denmark considered necessary for effective enforcement, but were fixed at four leagues during the reign of Christian V in 1687 where they remained until 1929.

These Danish maritime belts were intensely debated as neutrality zones during the various wars of this era between France, England, and Holland. France attempted to obtain Dansk and Swedish recognition of a three-mile limit so it was the probable maximum range at command. This was never specifically accepted. Gradually, a one-league neutrality zone became the acknowledged limit along the Danish coasts.

During the Seven Years War between France and England, Sweden adopted (1759) a three-mile neutrality zone in which no hostilities of any kind were permitted.[1] This decision, promptly adopted in deference to France, was increased to four miles in 1779 to conform with the Danish neutrality belt. In 1839 a Danish ordinance adjusted the limits home to one marine league across the mouth of Trelleborg.

It was during the early nineteenth century that "the cannon shot rule," attributed to Bynkershoek and the founder of the maritime belt, came to the forefront of international consideration of a three-mile belt of territorial zone as we understand it today.

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[1] E. Dana, "The Historical Origins of the Three-Mile Limit," 48 A.J.I.L. (1954), p. 560.

B. Modern Claims to Broader Jurisdiction Over the Territorial Seas

The three-mile limit was never universally recognized but the matter lost its significance as long as the seas were open and relative peace reigned in Europe--as it did through most of the nineteenth century. In 1909, Imperial Russia adopted a twelve-mile limit in order to protect her fishing interests and her security along her Pacific Ocean seacoasts. Great Britain and Japan refused to recognize the jurisdictional extension.[92] The Union of Soviet Socialist Republics has continued to maintain a twelve-mile limit as the extent of her territorial waters jurisdiction.[93]

In 1930 the Hague Codification Conference,[94] attended by forty-seven states and the then free city of Danzig, attempted to establish, by Convention, a universal width of the maritime belt. No agreement or compromise could be reached. At that time the disputants argued between a six-mile limit versus a three-mile limit. The principal advocates of the former included Italy, Spain, Brazil, Persia, Roumania, Turkey, and Yugoslavia; those states urging the latter limit included Great Britain and her Dominions, the United States, France, Germany, Japan, Belgium, China, Holland, and Poland.[95]

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[92]Colombos, The International Law of the Sea (5th ed., 1963), p. 78.

[93]U.S. Naval War College, supra note 32, at 285.

[94]Id., at 1, Note 2.

[95]Oppenheim-Lauterpacht, supra note 51, at 491, Note 2.

B. Modern Claims to Broader Jurisdiction
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[92]Colombos, The International Law of the Sea (6th ed., 1962), p. 76.

[93]U.S. Naval War College, International Law Situations, p. 41.

[94]Ibid., p. 43.

[95]Hudson-Deutsch, Amer. Journ. Int. L., p. 411, Note 2.

Twenty-eight years later, in 1958, the United Nations Conference on the Law of the Sea was convened in Geneva, Switzerland, and attended by eighty-six nations.[96] Although much was done to consolidate the Law of the Sea,(four Conventions were produced at the Conference), a solution to the variegated patterns of maritime belts which were encroaching on the world's seas could not be found. The infant coastal states, former colonies of the European States, frequently claimed a maritime belt of twelve miles--as did the majority of the communist bloc members and a few States of the Middle East. The three-mile limit, as well, maintained a large number of adherents, as did the six-mile maritime belt. Nor did the plethora of claims end here, but various states claimed four, five, nine, and ten-mile territorial seas. Some claims extended to two hundred miles.[97] North Korea specifically claims a maritime belt of twelve miles.[98] Not being a member of the United Nations, the People's Democratic Republic of Korea was not represented at the Geneva Conference.

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[96] U.S. Naval War College, supra note 32, at 491, Note 2.

[97] Id., at 273 et seq.,(app. K), for the extent of territorial seas jurisdiction claimed by various members of the United Nations in 1958.

[98] N.Y. Times, Jan. 24, 1968, at 14, col. 5.

In the ten years which have elapsed since the Conference, the situation has become even more difficult to solve. Forty-one members of the United Nations claim twelve miles jurisdiction over the seas littoral to their coasts; twenty-three states maintain a three-mile limit; and thirteen states adhere to a six-mile maritime belt. Others claim territorial seas varying from a minimum of four miles to a maximum assertion of two hundred miles.[99]

C. The Meaning of Territorial Seas Jurisdiction

The issue of the breadth of the maritime belt is important. Although there is no unanimity as to the nature of the right to territorial seas jurisdiction, it appears in the practice of states that it is a form of sovereignty rather than a form of riparian rights granted to landholders along a stream or river under the internal law of Common Law countries. It does not appear, however, that the maritime belt can be ceded by the littoral state to another nation,[100] Bynkershoek's opinion to the contrary, being no longer tenable, notwithstanding.[101]

Universal state practice indicates that the natural resources, including the living resources of the sea, within

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[99]W. L. Griffin, The Law of Ocean Space (temp. ed., 1968), p. 72 et seq. See also "National Council on Marine Resources and Engineering Development," Marine Science Affairs (Jan. 1969), app. C-4, p. 248.

[100]Oppenheim-Lauterpacht, supra note 51, at 463.

[101]Bynkershoek, supra note 81, at 5.

In the two years which elapsed since the Conference, the situation has become even more difficult to solve. Forty-one members of the United Nations claim exclusive rights jurisdiction over the seas literal to their coasts: twenty-three states maintain a three-mile limit; and thirteen states adhere to a six-mile territorial belt. Others claim territorial seas varying from a minimum of four miles to a maximum possession of two hundred miles.[99]

c. The Meaning of Territorial Seas Determination

The issue of the breadth of the territorial belt is important. Although there is no necessity as to the manner of the right to territorial seas determination, it appears in the practice of states that it is a form of customary nature tion a form of signing rights granted to boundaries along a strand or river under the internal law of common law country. It does not appear, however, that the maritime belt can be ended by the literal phrase to maritime region, and Symmetrically's opinion to the contrary, being no longer tenable, notwithstanding.[100]

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[99] E. L. Miller, The Law of Ocean Uses (Temp. ed., 1958), p. 72 et seq. See also "National Council on marine resources and engineering development," Marine Science Affairs (Gen. Inst), rep. C-1, p. 240.

[100] Pharmaceuticals, supra note 31, at 1.

the maritime belt--whether above, on, or beneath the seabed--belong exclusively to the littoral state.[102] The littoral state can control cabotage, intra-national seacoast trade within the territorial sea, and exclude foreign vessels from such activity within those seas.[103] Within the maritime belt the littoral state exclusively exercises police, sanitary, customs, and navigational authority and control. This control extends from beneath the sea through the air above the maritime belt.[104] For security purposes, among others, the littoral state can establish routes for foreign vessels to take while trans-navigating her territorial waters and prohibit the entrance of those vessels into certain specified areas of the maritime belt.[105] The state may also prescribe by laws and regulations maritime ceremonies to be followed by foreign vessels while using her territorial seas.[106]

As extensive as is this jurisdiction it is limited in important respects which distinguish it from the regime of internal waters. Customary international law entitles all foreign merchant vessels the right, in peacetime, to navigate territorial seas of all states as long as that passage is inoffensive to the littoral state.[107] Although the right to grant similar passage was not generally recognized in international law regarding foreign men-of-war, usage of nations

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[102] Oppenheim-Lauterpacht, supra note 51, at 492.

[103] Id., at 493; [104] Id., at 487 et seq; [105] Id., at 493.

[106] Id., at 493; [107] Id.

generally permitted a similar freedom to warships in peacetime as long as the passage was in no way harmful or offensive to the littoral state.[108] However many international law scholars, among them Elihu Root and W. E. Hall, maintained that because war vessels by their very nature threaten, they have no right of innocent passage.[109]

In 1949 the International Court of Justice decided the Corfu Channel Case.[110] It determined that international straits were open to transnavigation by foreign men-of-war in time of peace as long as that passage was innocent, and that no prior notification by the vessel's flag state was required before the transnavigation since such activity was granted under international law.

The Convention on the Territorial Seas and the Contiguous Zone, Section III,[111] "codifies" the right of innocent passage,[112] the decision in the Corfu Channel Case,[113] and defines

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[108]Oppenheim-Lauterpacht, supra note 51, at 494.

[109]Svarlien, supra note 82, at 195.

[110]The Corfu Channel Case (1949), I.C.J. Reports 4. See also U.S. Naval War College, International Law Documents 1948-1949, p. 109 et seq.

[111]U.S. Naval War College, supra note 32, at 197-200.

[112]Id., at 197-98, art. 14;

[113]Id., at 198, arts. 15 & 16(4).

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[109] Oppenheim-Lauterpacht, supra note 31, at 669.

[110] Westlake, supra note 83, at 180.

[111] The Corfu Channel Case (1947), I.C.J. Reports of Int'l Law, p. 169 et seq.

[112] U.S. Naval War College, supra note 31, at 107-109.

[113] Id., at 107-08, 109-14.

[114] Id., at 109, 112 & 114(1).

the rights and duties of both the littoral state[114] and the foreign vessel while navigating territorial seas, including international straits.[115]

The final distinction between the sovereignty of a coastal state within its territory as opposed to that which it exercises over its maritime belt, which bears mentioning here, is the matter of jurisdiction over vessels navigating through its belt. International law has virtually left a void in this area. Some states, such as the United Kingdom, have exercised jurisdiction by means of the Territorial Waters Jurisdiction Act of 1878,[116] whereas many writers believe that this is an improper exercise of jurisdiction.[117] The rule may be different, however, when the foreign merchant vessel casts anchor in the territorial seas,[118] and state practice varies.

The Convention limits jurisdictional exercise over foreign merchant vessels in the territorial seas to four categories: if the crime committed aboard the merchant vessel extends to the coastal state; if the crime tends to disturb

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[114] U.S. Naval War College, supra note 32, at 198-200, arts. 15, 16, 18, 19, 20 & 23.

[115] Id., at 197-200, arts. 14, 17, 19, 21, 22 & 23.

[116] Oppenheim-Lauterpacht, supra note 51, at 47.

[117] Id., at 495; [118] Id., at 503.

the rights and duties of both the littoral state[s] and the foreign vessel while navigating territorial seas, including international straits.[115]

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The Convention limits jurisdictional controls over foreign merchant vessels in the territorial sea to four categories: a) the right conferred coastal states to direct [illegible]

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[115] U.N. Docs. Geneva, Reports were 43, or Corr.-Corr. Docs. 15, 19, 76, 78 & 79.

[116] 41 & 42 Vict., chap. 73, 19, 21, 22 & 23.

[117] Oppenheim-Lauterpacht, supra note 31, at 47.

[118] Id., at 418; [illegible] Id., at 703.

the peace and tranquility of the coastal state; if the captain of the vessel or the consul of the flag state requests the coastal state for assistance, and if such exercise of jurisdiction is necessary to stop illicit traffic in drugs.[119]

Under international law a foreign warship is always considered to be a floating portion of the flag state, similar to a diplomatic mission, even though in foreign waters and never may she become subject to a coastal state's jurisdiction. Nor may an official of the littoral state board her without special permission.[120] Crimes committed on board the vessel by persons in the service of the vessel are subject to the exclusive jurisdiction of the flag state of the vessel. Even if a citizen of the littoral state commits a crime aboard the vessel, the flag state of the vessel may require he be brought to the flag state for prosecution.[121]

> On the other hand . . . unless special international agreements, or special treaties between the flag state and the littoral state, provide to the contrary in regard to a particular port or to certain territorial waters, a State is, in strict law, always competent to exclude men-of-war from all or certain of its ports, and, according to some, from those territorial waters which do not serve as highways for international traffic.[122]

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[119] U.S. Naval War College, supra note 32, at 199, art. 19(1).

[120] Oppenheim-Lauterpacht, supra note 51, at 853-885. See also J. L. Brierly, The Law of Nations (6th ed., 1963), p. 267 et seq.

[121] Oppenheim-Lauterpacht, op. cit., p. 854.

[122] Id., at 853.

the peace and tranquility of the coastal waters; if the capitain of the vessel or the council of the flag state requests the coastal state for assistance, and if such exercise of jurisdiction is necessary to stop illicit traffic in drugs.[119]

Under international law a foreign warship is always considered to be a floating portion of the flag state, similar to a diplomatic mission, even though in foreign waters and ports may also become subject to a coastal state's jurisdiction. Nor may an official of the littoral state board her without special permission.[120] Crimes committed on board the vessel by persons in the service of the vessel are subject to the exclusive jurisdiction of the flag state of the vessel. Even if a citizen of the littoral state commits a crime aboard the vessel, the flag state of the vessel may refuse to be brought to the flag state for prosecution.[121]

> On the other hand . . . unless special international agreements, or special treaties between the flag state and the littoral state, provide to the contrary in regard to a particular port or to certain territorial waters, a state is, in strict law, always competent to exclude non-nationals from all or certain of its ports, according to some, even those territorial waters which do not serve as highways for international traffic.[122]

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[119]U.N. Docs. cited, supra note 11, at 193,art.19(1).

[120]Oppenheim-Lauterpacht, supra note 21, at 613-614. See also J.B. Moore, The Law of Nations (rev ed., 1905), p. 247 et seq.

[121]Oppenheim-Lauterpacht, supra note 21, at 614.

[122]Id., at 611.

The Convention adopted these international rules regarding warships, but in recognition of the limited extraterritoriality of these vessels provided a single sanction, as recognized by international law in Article 23:

> If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea.[123]

D. Limited State Claims to Jurisdiction Beyond the Territorial Waters-- Contiguous Zones

The Convention on the Territorial Sea and the Contiguous Zone recognizes the latter and defines it in Article 24 as "a zone of the high seas contiguous to its territorial sea . . . /which/ may not extend beyond twelve miles from the base line from which the breadth of the territorial sea is measured."[124] In this area the coastal state is authorized to exercise control necessary to prevent infringement of its customs, fiscal, immigration or sanitation regulations within its territory or its territorial sea and to punish those who are responsible for the infringement of such regulations while within its territory or its territorial sea.[125]

The policy of the United States has been that there is a protective jurisdiction which extends beyond the territorial sea for limited purposes,which is necessary to effectively

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[123] U.S. Naval War College, supra note 32, at 200.

[124] Id., at 200-01, arts. 24(1) and (2); [125] Id.

The Convention adopted three international rules regarding warships, but in recognition of the limited extraterritoriality of these vessels provided a single sanction, as recognized by international law in Article 23:

> If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea.[123]

3. United States Claims to Jurisdiction beyond the Territorial Waters-- Contiguous Zones

The Convention on the Territorial Sea and the Contiguous Zone recognizes the latter and defines it in Article 24 as "a zone of the high seas contiguous to its territorial sea . . . [which] may not extend beyond twelve miles from the base line from which the breadth of the territorial sea is measured."[124] In this zone the coastal state is authorized to establish control necessary to prevent infringement of its customs, fiscal, immigration or sanitation regulations within its territory or its territorial sea and to punish those who are responsible for the infringement of such regulations while within the territory or its territorial sea.[125]

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[123] U.S. Naval War College, supra note 32, at 200.

[124] Id., at 200-01, Arts. 24(1) and (2); [122] Id.

enforce the coastal state's territorial sovereignty. The distance has been measured in miles, sailing time, and other methods.[126] Great Britain and other states have similar provisions.[127] Such assertions to jurisdiction over the area beyond the territorial sea have been most common in sanitation and customs regulations.

As early as 1799 the United States adopted revenue laws which extended its jurisdiction on the high seas to acts committed within four marine leagues of its coasts.[128] During its Prohibition Era, the United States claimed the rightto stop, search, and seize foreign vessels suspected of smuggling alcoholic beverages into the country although they were beyond four marine leagues from the coast, in order to effectuate the Volstead Act.[129] Since ships were often stopped even though they were not bound for ports within the United States, many states strongly objected. Ultimately, treaties were concluded with many states which contained seizure of vessels within

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[126] But see Dickenson, Jurisdiction at the Maritime Frontier, 40 Harv. L. Rev. 1 at 13 (1926) where it was argued that a distance measurement alone is for many purposes impractical in delimitation of the territorial sea.

[127] Oppenheim-Lauterpacht, supra note 51, at 495 & 496.

[128] 1 Stat. 627, 647, 700 (1799).

[129] 42 Stat. 858, 581 et seq. (1922), The Tariff Act of Sept. 21, 1922.

enforce the coastal state's territorial sovereignty. The distance has been measured in miles, sailing time, and other methods.[126] Great Britain and other states have similar provisions.[127] Such assertions to jurisdiction over the area beyond the territorial sea have been most common in navigation and customs regulations.

As early as 1790 the United States adopted revenue laws which extended its jurisdiction on the high seas to acts committed within four marine leagues of its coasts.[128] During its Prohibition Era, the United States claimed the right to stop, search, and seize foreign vessels suspected of smuggling alcoholic beverages into the country although they were beyond four marine leagues from the coast, in order to effectuate the Volstead Act.[129] Cases arise were often escaped even though they were not bound for ports within the United States, many grave strategic objectives. Historically, treaties were concluded with many states where established maximum of vessels within

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[126] See Dickenson, Jurisdiction of the Territorial Sea, 23 Mich. L. Rev. 1 at 12 (1924) where it was argued that a distance measurement alone is too many variables impractical to delimitation of the territorial sea.

[127] Oppenheim-Lauterpacht, supra note 21, at 512 & (2).

[128] 1 Stat. 627, 637, 703 (1790).

[129] 41 Stat. 305; 50 U.S.C. (1917). See Regis F-1 at page 21, 1927.

one hour sailing time from the United States coasts based on the speed of the vessels seized.[130]

Chief Justice Marshall, in 1804, enunciated the principle that the right of self defense of a state's territory permitted a state to exercise jurisdictional rights beyond the immediate territory of the state.[131] In this case the seizure of an American commercial vessel on the high seas by the Portuguese authorities who were protecting the commercial interests of their colony of Brazil was upheld by the United States Supreme Court as a lawful exercise of jurisdiction under international law. This was based on the theory of international law that an unreasonable attempt at extraterritorial jurisdiction would be evidenced by the objections of other nations and that any exercise of defensive jurisdiction not objected to by other states was permissible under the Law of Nations.

Although generally the maximum limit for customs regulation, revenue laws, and claims for exclusive fishing rights has been limited to twelve miles, the Anti-smuggling Act, passed in 1934, authorizes the President of the United States to establish temporary customs enforcement areas which can extend

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[130] Oppenheim-Lauterpacht, supra note 51, at 498 & n. 3. Treaties, Great Britain: Jan. 23, 1924; Norway: May 24,1924; Japan: May 21, 1928.

[131] Church v. Hubbard, 6 U.S. (2 Cranch) 187 (1804).

one hour waiting time from the United States counts toward on the speed of the vessels seized.[130]

Chief Justice Marshall, in 1801, enunciated the principle that the right of hot pursuit of a state's territory permitted a state to prosecute jurisdictional rights beyond the immediate territory of the state.[131] In this case the seizure of an American commercial vessel on the high seas by the Portuguese authorities who were protecting the commercial interests of their colony of Brazil was upheld by the United States Supreme Court as a lawful exercise of jurisdiction under international law. This was based on the theory of international law that an unfriendly attempt at extraterritorial jurisdiction might be evidenced by the objections of other nations and that any exercise of defensive jurisdiction not objected to by other states was permissible under the law of nations.

Although generally the maximum limit for customs regulation, revenue laws, and claims for exclusive fishing rights has been limited to twelve miles, the Anti-smuggling Act, passed in 1924, authorizes the President of the United States to publish Executive customs enforcement areas which can extend

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[130] Oppenheim-Lauterpacht, supra note 81, at 699 & n. 3. Treaties, General Relations: Gen. 32, 1924; Bolivia: May 26,1924; Japan: May 22, 1923.

[131] Church v. Hubbart, 2 U.S. (2 Cranch) 187 (1804).

sixty-two miles from the coast.[132] Granted that such broad extensions can only be exercised where "reasonable," but the limited claim to jurisdiction is nevertheless extensive.

As an exercise of self-defense jurisdictional expansion, the United States Department of Commerce has established Air Defense Identification Zones which extend from the Atlantic, Gulf, and Pacific coastlines of the United States over a considerable expanse of the high seas. The depths of the Zones are measured by two hours air cruising time from the Nation's coasts.[133] Aircraft approaching the coasts of the United States are required to identify themselves. These regulations technically apply only to aircraft, foreign and domestic, intending to enter the United States. Nevertheless, the United States is exercising real, though limited, jurisdiction well beyond the three-mile limit of territorial seas which she claims under international law as the extent of her sovereignty.

Because this is the area of the seas in which the United States alleged that the Pueblo seizure occurred, it is relevant to examine the United States claims beyond her territorial seas. What is claimed as legitimate jurisdictional exercise by one protagonist cannot properly be denied to the

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[132] 19 U.S.C., ss. 1701-1711. See Jessup, "Legality of the Anti-Smuggling Act," 31 A.J.I.L. 101 (1937).

[133] 14 C.F.R., ss. 620.12(b)(2) & 630.18 (1952).

other. Although the United States ratified the 1958 Convention without reservation, the laws extending Contiguous Zones beyond the maximum limit of twelve miles remain on the books. On the other hand, North Korea, which claims twelve miles as a limit to her territorial seas, is not a signatory to this Conventionland is not bound to limit her contiguous zones to twelve miles from her coasts until such time as the Convention is established as international law.

V THE CONTEXT OF THE CRISIS RELATIONSHIP BETWEEN THE UNITED STATES OF AMERICA AND THE PEOPLE'S REPUBLIC OF NORTH KOREA

A. A State of War or Peace?

North Korea is a State in the classic sense. She is in possession of fixed territory, containing a permanent population, and she possesses a government which represents and carries on state authority. This, of course, also applies to South Korea. These artificial Republics, formed from the areas of a once integral State along the boundaries of shared occupation between the Soviets in the North and the Americans in the South after the Second World War, reflected the economic and political philosophies of their occupiers.[134]

When the North Korean armies invaded South Korea, the Security Council succeeded in passing a resolution to "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the Area."[135] The Soviet Union's boycott of that

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[134] Baily, supra note 3, at 819.

[135] U.N. Doc. S/1511, June 27, 1950.

V. THE CONTENT OF THE CHARGE RELATIONSHIP BETWEEN THE UNITED STATES OF AMERICA AND THE PEOPLE'S REPUBLIC OF NORTH KOREA

A. A State of War or Peace?

North Korea is a state in the classic sense. She is in possession of fixed territory, containing a permanent population, and she possesses a government which represents and carries on state autonomy. This, of course, also applies to South Korea. These artificial dogmatics, forced from the ashes of a once integral state along the boundaries of armed occupation between the Soviets in the North and the Americans in the South after the second World War, reflected the economic and political philosophies of their occupiers.[134]

When the North Korean armies invaded South Korea, the Security Council succeeded in passing a resolution to furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.[135] The United Union's judgment at that

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[134] Smith, Korea note 5, at 310.

[135] U.N. Doc. S/1511, June 27, 1950.

Organization for refusing to unseat Nationalist China made the passage of that resolution possible.

1. Legality of the United Nations' Actions in Korea.

Since the relationship between the United States and North Korea began with the Korean War it is first necessary to determine the legality of the United Nations' actions in response to the North Korean invasion of June 24, 1950.

Article 27(3) of the United Nations Charter requires that decisions of the Security Council other than those procedural be made by seven affirmative votes including the concurring votes of the permanent members.[136] During the critical months of June and July 1950 the Soviet Union, a permanent member of the Security Council, had deliberately absented herself from the Security Council with the intent of destroying the capacity of that organization to function.[137]

Professor Stone argues, not without effect, that due to the nonconformity of the Council to the procedural rules of

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[136] L. M. Goodrich and E. Hambro, Charter of the United Nations (Boston: World Peace Foundation, 2d Rev. ed. (1949), p. 590.

[137] The Soviet Union declared that it would consider none of the resolutions of the Security Council to have any force or effect because two members of the Security Council were absent, namely, the real representatives of China--those sent by the government of Mao Tse-tung—and those of the Soviet Union itself. See also M. S. McDougal, The Veto and the Charter: An Interpretation for Survival, 60 Yale L.J. 258 & 278 (1951).

the Charter it must be concluded that the "call" to cease fire and the recommendatory resolution of the Security Council of June 27, 1950[138] asking the United Nations membership to contribute "such assistance to repel the armed attack and to restore international peace and security in the area" were ineffective as legal resolutions.[139] He continues by pointing out that Articles 43 and 45 of the Charter[140] under which the Security Council acted could not be binding as a decision since those articles depended on special agreements between the individual members of the United Nations regarding the availability of armed forces and such agreements had not as yet been concluded. For this reason, explains Stone, the action taken was in the form of a recommendation rather than a resolution.[141]

Professor Stone, however, fails to consider Article 106 of the Charter[142] which requires that the five permanent members of the Security Council consult and take joint action as

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[138]L. B. Sohn, United Nations Law (Brooklyn Foundation Press, Inc., 2d ed., 1967), p. 480.

[139]J. Stone, Legal Controls of International Conflict (Sydney: Maitland Publications Pty., Ltd., 1954), p. 231 et seq.

[140]Goodrich and Hambro, supra note 136, pp. 281-89.

[141]J. Stone, op. cit., p. 233, n. 29.

[142]Goodrich and Hambro, supra note 136, p. 530 et seq.

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Professor Stone, however, feels to consider article 106 of the Charter[142] which requires that the five permanent members of the Security Council consult and take joint action as

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[138] J. L. Kunz, United Nations Law (Dobbs Ferry Foundation Press, Inc., 1st ed., 1956), p. 620.

[139] Stone, Legal Controls of International Conflict (Sydney, Maitland Publications Pty., Ltd., 1954), p. 711 et seq.

[140] Goodrich and Hambro, Charter note 136, pp. 311-09.

[141] Stone, op. cit., p. 713, n. 69.

[142] Goodrich and Hambro, Charter note 136, p. 319 et seq.

necessary so that Chapter VII of the Charter, concerning action to be taken in regard to threats to the peace, might be effectively implemented pending the working out of the special agreements. The Soviet Union's failure to conform to Article 106 of the Charter would hardly prevent joint action ounder that article by the other members who desired to fulfill their obligations to the United Nations,

Nevertheless, the allegation by the Soviet Union's delegation to the Security Council that Article 27(3), strictly and properly interpreted, prevents the Security Council from functioning in the absence of one of the permanent members was effectively answered by the United Kingdom representative to the Security Council:

> (T)o maintain that the Security Council must be powerless because one member in a fit of pique simply boycotts it, is really to admit that the Security Council, and indeed the whole of the United Nations, can function only if it functions in accordance with the wish, and even the behest, of one individual permanent member. . . . I cannot conceive that any rational human being would admit that the theory ought to be abused in such a way as this, more especially since all the great Powers . . . have entered into a solemn obligation to abide by the purposes and the principles of the Charter. . . .[143]

The dispute of whether the Security Council could function when a permanent member of that body was absent in light of Article 27(3) was significant not only regarding the Korean

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[143]Sohn, supra note 138, pp. 486-87.

Resolutions' legality but for the existence of the United Nations itself. Professor Gross of Fletcher School of Law and Diplomacy and Professor McDougal of Yale University wrote articles supporting the restrictive and expansive interpretations respectively.[144] As Professor McDougal points out in his article, the practice of the United Nations, together with the fact that the Charter is a constitutional instrument which will evolve in time to merely a framework for the functioning of the United Nations, cannot be given a restrictive interpretation, especially when it does not conform with that body's

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[144] See L. Gross, Voting in the Security Council: Abstention from and Absence from Meetings, 60 Yale L.J. 209 (1951), where he said that the framers of the Charter made an error in the unanimity rule but it has to be lived with. For if absence is no more than abstention, then the Council can function if four of the five permanent members are absent from the Security Council meeting, and certainly the framers did not intend this. For these and other reasons determined that Article 27(3) of the Charter could only be read as paralyzing the Security Council if a permanent member was absent. See also McDougal, supra note 137, p. 258. This article begins by pointing out that Article 27(3) of the Charter does not read "all five" permanent members "who must be present and voting." Further, Professor McDougal argues that words do not have clear meanings of themselves but that they must be given a rational meaning within the framework of their purpose. Beyond this the practice of the Body demonstrated that absence was considered an abstention to the point that Goodrich & Hambro in their work on the United Nations, which was sanctioned by that Organization, reached this conclusion prior to the Soviet walkout of January 1950. For these and other reasons the professor believes that the absence of a permanent member will not force the Security Council's functioning to grind to a halt.

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[144] See L. Sloss, Voting in the Security Council: Abstention from and Absence from Meeting, 20 Yale J.I.L. 209 (1995), where he said that the framers of the Charter made no error in the unanimity rule but it has to be lived with. But if absence is no more than abstention, then the Council can function if four of the five permanent members are absent from the monthly Council meeting, and certainly the framers did not intend this. For this and other reasons mentioned that article 27(3) of the Charter should only be read as permitting the Security Council if a permanent member was absent. See also Bedjaoui, supra note 117, p. 258. This article, saying by pointing out that Article 27(3) of the Charter does not read "all five" permanent members "who must be present and voting." Further, Professor Bedjaoui argues that words do not have clear meanings of themselves but that they must be given a rational meaning within the framework of their purpose. Beyond this the decision of the duly constituted organ was considered as objective to the point that abstention was considered to be tantamount to the position a country is in that organization. Bedjaoui was answered by that explanation. Commented this conclusion prior to the latest edition of January 1990. For these and other reasons the Professor believes that the absence of a permanent member will not leave the Security Council's functioning to grind to a halt.

practice. The only rational result appears to be the recognition of the voluntary absence of a permanent member of the Security Council as an abandonment of his prerogatives and privileges, thereby permitting that body to function in face of such an absence. The actions of the Security Council and the General Assembly attest to this interpretation of the Charter, not only demonstrating that such an absence will not prevent the Security Council from functioning but confirming that the resolutions of that United Nations Organ after North Korea's invasion of the South were legally binding as well.

2. The Status of the United States Relative to its Position in the Korean Conflict.

The Korean conflict, although officially a "Unified Command" under the United Nations Flag, maintaining peace and security of the world, was, in the words of one author:

> in effect, chiefly an American enterprise . . . its political direction was dominated chiefly by the United States. In fact, if it had not been for American initiative the international police force in Korea would not have come into existence at all.[145]

If the United States is in law one of the belligerents in the Korean conflict, and that conflict can be classified as a war, it could be argued that the seizure of the Pueblo was North Korea's privilege as a belligerent in time of war depending, of course, upon the effect of the Armistice. For, in time of

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[145] J. G. Stoessinger, The Might of Nations (New York: Random House, 1963), p. 369.

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[45] J. C. Charlesworth, The Role of United Nations (New York: Harcourt Brace, 1951), p. 221.

war enemy warships can be attacked on sight and either captured or destroyed.[146] The real significance of the United States status is obvious. For if the United States was and remains in a belligerent status relative to the People's Democratic Republic of North Korea and *vice versa* since the signing of the Armistice Agreement, then the seizure of the *Pueblo* would be a legal act of belligerency under international law, leaving the United States no recourse to act, and the matter would be closed. Therefore, the legality of any positive action or choice to take positive action against North Korea after that State seized the *Pueblo* is dependent upon the United States as a State, separate and distinct from its relationship with North Korea through the United Nations during the Korean War, being freed from a status of belligerency as to North Korea under customary international law.

The resolution of the Security Council on July 7, 1950 recommended to all Members of the United Nations acting pursuant to earlier Security Council resolutions in providing troops and other assistance that they make such assistance available to the Unified Command under the direction of the United States; requested the United States to designate a commander for the Command; and authorized the use of the

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[146] U.S. Naval War College, *International Law Studies 1955*, pp. 56 & 397.

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[146] D.J. Harris, Cases and Materials on International Law (London
1973), pp. 30 & 31.

United Nations flag in the course of operations against North Korea.[147]

Although the United States did supply about 90 percent of the manpower and material used in the police action, fifteen member states other than the United States and South Korea contributed troops and thirty-seven other members offered to contribute a wide range of supplies and services.[148] The United Nations never considered the hostilities in Korea as an American effort. Both the members of that Organization and the United States Government in particular considered their contributions of men and materials as part of a United Nations effort to maintain international peace and security.[149] President Truman declared that the United States was not at war at the inception of the fighting.[150] Officially, this position was maintained throughout the conflict. The United States Government refused to accept protests addressed to it by the Soviet Union and Red China based on the alleged illegal acts of the American forces in Korea. The United States claimed that the action was a United Nations effort and so insisted that complaints go to the Secretary General of the United Nations.[151] In addition to

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[147] Sohn, supra note 138, p. 481.

[148] Stoessinger, supra note 145, pp. 367-68.

[149] Sohn, supra note 138, p. 510 et seq.

[150] N.Y. Times, June 30, 1950, at 1, col. 5.

[151] H. Lauterpacht, "The Limits of the Operation of the Law of War," 30 Brit. Y.B. Int'l. L. 206 at 221, n. 152.

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[147]Cohn, supra note 132, p. 491.

[148]Commentary, supra note 145, pp. 387-88.

[149]Ibid., supra note 139, p. 910 et seq.

[150]N.Y. Times, June 30, 1950, at 1, col. 3.

[151]L. Lentcoupeane, "The Limits of the Operation of the Law of War," 10 Brit. Y.B. Int'l. L. 206 at 214, n. 132.

the foregoing, the preponderance of United States assistance is understandable considering its position as a world power and its ability to accomplish the goals desired by the United Nations, whose very existence depended upon the success of its Korean enterprise.

Therefore, the status of the United States, as well as that of the other nations participating in this initial attempt to prevent aggression through the machinery of the United Nations, was not that of a belligerent at war with North Korea in the classic sense. The "belligerency" as it existed would be first between the North Korean "state" and the United Nations as participants in the world order process, and only shared by those states serving in the Unified Command as members thereof.

3. The Juridical Character of the United Nations.

Action in Korea:

The Korean conflict is difficult to classify within the traditional concepts of international law. Although Korea was looked upon as a single state temporarily divided by all parties interested in the conflict, the conflict was not a civil war.[152] The Soviet Union insisted that the dispute in Korea was an internal affair and not within the competence of the United Nations. In fact, the attitude of the proponents of

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[152] P.B. Potter, "Legal Aspects of the Situation in Korea," 44 A.J.I.L. 709 (1950).

[52] R.S. Baker, "Naval Aspects of Air Intervention in Korea," 46 N.U.L.R. 701 (1960).

both sides was that the Korea recognized by the other was a puppet regime rather than a regime representing the people. Both North Korea and South Korea possessed a constituted government, a fixed population, and a territorial delimitation. The North Korean declaration of war on South Korea is not consistent with its being classified as a civil war. It isddifficult to deny that the events after World War II produced a people divided into two states, and the concern regarding which government was legitimate is a question of recognition. There was in fact a war between states when North Korea invaded the South. The classic definition of war could be applied to the fighting between the two Korean governments in that the three basic elements were present: a hostile contention; by means of armed forces; carried on between states.[153] Nevertheless, the Korean police action by the United Nations forces was not referred to as "war" in the legal sense of the term by the United Nations or by individual members of the United Nations.[154] The United States recognized only the South Korean Government because it alone had conformed with the Resolution of the General Assembly of November 14, 1947 regarding free elections.[155]

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[153]Dept. of Army Pamph. 27-161-2, 2 International Law 27 (1962).

[154]Lauterpacht, supra note 151. See also P.C. Jessup, "Should International Law Recognize an Intermediate Status between Peace and War"? 48 A.J.I.L. 98 (1954).

[155]Sohn, supra note 138, at 474-77.

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[153]Comp. of Army Forces, 27-161-2, 1 International Law 27 (1962).

[154]Lauterpacht, supra note 151. See also 3 C. Greaves, "Would International Law Recognize an International State between Peace and War"? 69 A.J.I.L. 69 (1954).

[155]Note, supra note 152, at 474-77.

Thus, the United Nations enforcement action was considered at most a limited war of international character to maintain international peace and security and prevent the defiance of the United Nations by North Korea. Both sides acknowledged the applicability of the International Law of War and the Geneva Conventions of 1949.[156] The conduct of the conflict was confined to the Korean Peninsula. Neither side declared war on the other[157] save North Korea's original declaration against the South. Although the Soviet Union and Communist China clandestinely assisted North Korea with arms and, finally, as the United Nations Command approached the Sino-Korean boundary, with Chinese "volunteers," neither ventured to challenge overtly the Unified Command in spite of their claims that the United Nations efforts were illegal. The goals of the action and the war zone remained limited and localized throughout the confrontation and for the two years of armistice talks.

4. The Legal Status Created by the Korean Armistice.

Since neither side succeeded in forcing its will upon the other short of a greatly expanded war effort, and since peace was impossible since by definition that would require a permanently divided Korea, an armistice was signed on July 27, 1953.

An armistice is the cessation of active hostilities for

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[156] Lauterpacht, supra note 151, at 223.

[157] Stone, supra note 139, at 310.

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[156]Greenspan, supra note 151, at 313.

[157]Id., supra note 137, at 110.

a period agreed upon by the belligerents. It is not a partial or a temporary peace.[158]

In the past, armistices were resorted to for administrative and related purposes until a treaty of peace could be concluded to formally end the state of war,and the terms were usually dictated from one side to the other.[159]IIn Korea, this changed. The terms were limited to cessation of military operations and repatriation of prisoners,together with the creation of machinery to enforce the provisions of the agreement.

The Preamble of the Korean Armistice Agreement declares its authors' purposes to be:

> . . . in the interest of stopping the Korean conflict, . . . establishing an armistice to assure a complete cessation of hostilities and of all acts of armed force in Korea until a final peace settlement is achieved . . . said conditions and terms are intended to be purely military in character and to pertain solely to the belligerents in Korea.[160]

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[158]General Armistices are usually of a combined political and military character. They usually precede negotiations for peace. A general armistice is normally concluded by senior military officers or by diplomatic representatives. See Dept. of Army Field Manual, FM 27-10, 'The Law of Land Warfare, s. 483 (1956).

[159]M.W.Graham,"Armistices 1944 Style," 39 A.J.I.L. 286 (1945).

[160]4 U.S.T.I.A. 236 (1953).

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[153] S. Lockman, Armistices 1954 Style, 28 A.B.A.J. 204 (1942).

[154] U.S.T.I.A. 316 (1953).

Does the Korean Armistice, which normally does not end a state of war but only stops hostilities, within the framework of the Korean situation in effect become more than an armistice and actually bring a termination to the war as well?

Traditionally, the most common means to terminate a state of war, setting aside the newer concept of a limited war, is by a treaty of peace between the belligerents. This is usually accompanied in more recent times by a complete subjugation of one of the belligerent powers to the other and a virtual destruction of its political existence.[161] A treaty of peace is not the sole means of terminating a state of war, and at times it is diplomatically disadvantageous. Termination of a state of war is a political act, and so must be established through the political arm of the state governments involved.[162]

An armistice, however, has not been recognized as a method of bringing a legal state of war to an end. Although

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[161] W.W. Bishop, International Law - Cases and Materials (2d ed., 1962), p. 785.

[162] The United States, for instance, can end a state of war by legislation as it did with Germany after World War I, or by presidential Proclamation as it did with Germany after World War II. The First World War was terminated by Joint Resolution of Congress on July 2, 1921 (42 Stat. 105) and on October 24, 1951 President Truman issued a Proclamation declaring the state of war between Germany and the United States terminated, based on House Joint Resolution 289 of October 19, 1951. See Bishop supra note 161, at 700 & 786-87..

[16] W.W. Bishop, International Law - Cases and Materials (3d ed., 1962), p. 785.

when accompanied by a cessation of hostilities and a withdrawal of enemy forces and where both parties indicate that the war is over, the armistice, given time, may ripen into a legal end to a state of war.[163] It has become increasingly evident in modern times that there must exist in fact, if not in law, a middle ground--a factual continuam--between peace and war. A number of publicists have referred to the impracticalities of international law in requiring a treaty of peace to conclude a state of war when in fact they are years in the making.[164] These authors see a modern trend to regard general armistice as not merely a permination of hostilities, but as a de facto termination of war.

This is especially true in the Korean Situation. The Armistice provided a status quo ante bellum. It solved none of the problems which caused the war in the first place. Both sides were intact as neither was capable of destroying the other within the scope of a limited war since the United States by its policy decided not to use nuclear weapons. The net result of three years of bloodshed was the loss to the North Korean Government of 1,500 square miles of territory.[165]

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[163]Bishop, supra note 161, pt. 785.

[164]Stone, supra note 139, pt. 646. See also 10 Whiteman's Digest of International Law.(1968) & Dye,"Legal State of the Korean Hostilities," 45 Geo. L.J. 45 (1956).

[165]Baily, supra note 3, pt. 827.

Akin to this is the fact that there never was a state of war recognized between the United Nations forces and the North Korean and Chinese "volunteer" forces. As there was no formal beginning of a state of war it can be logically accepted that no formal treaty of peace is necessary. This is not true between the Koreans themselves. But even here an armistice might be considered adequate. The lack of political and economic intercourse between the two sections of Korea has been in existence for so long that the continuation of a legal state of war between them will not hurt trade relations and the like. Both sides are determined to reunite the Peninsula as they were prior to the Korean conflict, and so a treaty of peace is impossible.

Therefore, the armistice between the participants in Korea becomes tantamount to a permanent end to the hostilities as they existed after the North Korean invasion of June 1950. Even though the Armistice was limited to military matters still it qualifies as a general armistice, for political matters remained as they existed prior to the hostilities.

Between July 1953, when the Armistice came into effect, and January 1968, the time of the seizure of the Pueblo, the Armistice had remained the only document to demonstrate the end of active hostilities. During that time, as already noted, numerous "serious" violations of the Armistice were recorded on both sides, although the worst incidents were caused by the

North Korea. The Hague Regulations of 1907 provide:

> Any serious violation of the Armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.[166]

Were the Armistice considered to be no more than a temporary cessation of hostilities, the United Nations Command could have denounced the Armistice or even resumed hostilities. This is also true of North Korea. Neither side has so much as considered this a proper course of action. The Korean Armistice has been treated as though it is something more than a temporary end to hostilities. The de facto state of war in Korea has, by the Armistice, become a de facto termination of wary.

B. A Legal Analysis of the Claims surrounding the Seizure of the Pueblo

It is best to examine the arguments of each side as though the writer were an advocate for the other protagonist in the dispute, as it points up the inadequacies of the world order system, as it exists today, in dealing with the situation. First, the immediate claims of the Democratic People's Republic of Korea must be considered. These are two: That the Pueblo was a "spy ship" sent by the United States and that it intruded into North Korea's territorial seas, thereby creating serious provocation. Secondly, an inquiry will be made into the counterclaims of the United States that the seizure was an act

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[166] Dept. Army Field Manual, supra, note 158, at 175.

[illegible] the Korean Armistice. The Korean Armistice Regulations of 1953 provide:

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[164] Hqtr. Army Field Manual, supra, note 139, at 174.

of piracy and that the seizure was illegal per se as uncountenanced by international law. Last, the acts of both sides will be examined as "aggression" to demonstrate that in many respects the efforts of the world to outlaw aggression not only have failed in their purpose, but could serve to produce a war where both sides insist that it was the "aggression" of the other that required it to fight a defensive war.

1. The Korean Claims.

The Pueblo was an "armed spy ship" of the United States:

Article 29 of the Hague Regulations defines a spy as (1) a person who (2) acting clandestinely or on false pretenses (3) obtains or endeavors to obtain information (4) in the zone of operations of a belligerent with the intention of communicating it to the hostile party.[167]

This definition provides for spying in time of war rather than peace, and so the relevance of the Armistice becomes important. The Armistice effectively ended the state of war, for if it did not the North Koreans could have claimed that the hostilities still existed and thus the seizure of the Pueblo was legal under the laws of war. Even in peace, however, spying is pursued. Lauterpacht calls spies "Agents without

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[167]Deptt. Army Pamph., supra note 153, at 57.

[168]H.S. Levie, "The Nature and Scope of the Armistice Agreement," 50 A.J.I.L. 880 at 904 (1956). During a General Armistice belligerents appear to retain the right to capture vessels belonging to the enemy.

Diplomatic or Consular Character."[169] They are secret agents of a state sent abroad to acquire military or political secrets. They are sent clandestinely and although such activity is not considered illegal or immoral, spies, if caught, are subject to the municipal law of the capturing state unless they possess a cloak of diplomatic immunity.[170]

A spy may be a member of the armed forces, but he must act surreptitiously or under false pretenses to be treated as a spy.[171] The Pueblo itself was not disguised. It is conceivable that the claimed purpose of the United States that the vessel was acquiring hydrographic data and radio waves when in addition she was recording and analyzing a much broader scope of information could imply that the vessel was acting under false pretenses. This, however, is stretching the meaning of "false pretense" too far. Both participants were aware of the nationality and the status of the vessel. Its purpose was known to both parties as that of gathering information. Therefore, the personnel, being clearly within the definition of naval forces, could not be tried as spies under any proper definition of the term.

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[169] Oppenheim-Lauterpacht, supra note 51, at 859 & 862.

[170] Id.

[171] Dep't. Army Pamph., supra note 167, at 58.

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[169] Convention-Consular, supra note 81, at 852 & sec.

[170] Id.

[171] Dep't. Army Pamph., supra note 167, at 78.

Consequently, even if the vessel encroached into the territorial seas of North Korea in time of war, the personnel aboard the vessel must be given the status of prisoners of war. In time of peace the vessel cannot be seized, as it is a foreign man-of-war. It is illegal to place the personnel aboard the Pueblo in the status of spies and bring them before a local court for adjudication. The current regime of territorial seas does not provide the adjacent state with authority to capture and charge crew members of foreign men-of-war for spying.

Claims that the Vessel Violated the Territorial Waters of North Korea:

On the face of the dispute international law is clear. A foreign man-of-war is immune from seizure not only in international waters but within the territorial seas of states as well. Unless the status of the parties is that of belligerents it is difficult to justify the seizure of a foreign man-of-war at all. If it were to be tolerated as absolutely necessary, a seizure should be the means of last resort. Had the North Korean authorities issued official warnings to the United States Government either through the Military Armistice Commission at Panmunjom or through some mutually recognized power, then proceeded to drive out encroaching United States men-of-war, the seizure of the Pueblo would acquire a guise, at least, of necessity. Should these efforts fail to stop United States encroachment, then a seizure might be tolerated as the only sanction remaining to North Korea. In view of present world practice

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regarding intelligence-gathering vessels, there can be no justification in the North Korean claim that the Pueblo violated its territorial seas. There is no concrete evidence that the Pueblo was ever closer than thirteen miles to the shores of North Korea.[172] The United States offered the evidence it had. The North Korean authorities, who had the ship's logs and records, offered only confessions of crew members for proof of the encroachment.

2. United States Counterclaims.

The Seizure as Piracy:

Piracy in its strictest meaning is every unauthorized act of violence committed by a private vessel on the open sea against another vessel, with the intent to plunder.[173] However, it can be argued that the concept of piracy has been extended from its intended meaning and that it now applies to all ruthless acts of lawlessness on the high seas by whomsoever committed.[174] Nevertheless, this seizure cannot be classified as piracy for a number of reasons.

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[172] Soviet intelligence-gathering vessels regularly take station in South Korean waters, the waters off the coast of Viet-Nam, and near the United States airbase in Guam. They are likewise stationed off the harbors of San Francisco and Charleston, South Carolina, observing the movement of the nuclear submarines of the United States Navy. They remain beyond the territorial seas of the United States. See N.Y. Times, Jan. 25, 1968, at 14, col. 8.

[173] Oppenheim-Lauterpacht, supra note 51, at 609.

[174] Id., at 612-14.

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[173] Oppenheim-Lauterpacht, supra note 51, at 509.

[174] Id., at 512-14.

Piracy can be committed on the open seas and in situations where the attack was from the open seas, under customary international law.[175] If the facts prove that the vessel was seized in North Korean territorial waters it must be shown that the seizure resulted from a descent upon the Pueblo from the open seas. Should this be successfully demonstrated the argument remains untenable unless it can be shown that the actions and intent of the North Koreans were piratical and without governmental authority, since only under such circumstances can a man-of-war be designated a pirate vessel.

The North Korean patrol vessels which seized the Pueblo undoubtedly had the support of their government. Those vessels were readily recognizable as men-of-war. These facts were demonstrated by the events subsequent to the seizure. As they were men-of-war, the maximum redress possible under international law, assuming there were unjustified acts of violence, would appear to require a form of redress from the flag state.[176]

Moreover, the Convention on the High Seas of 1958, to which the United States is a party, further limits the application of the term "piracy." Acts of violence constituting piracy can only be attributed to warships whose crew has mutinied and controls the vessel to which those deeds are attributed.[177]

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[175]Oppenheim-Lauterpacht, supra note 51, at 615; [176]Id., at 610.

[177]See. Naval War College, supra note 32 at 207, art. 16.

There is no evidence that a charge of piracy could be successfully applied to the North Korean patrol vessels or their crews.

The Counterclaim that the Seizure of the Pueblo was Illegal per se as a Matter of International Law:

Traditionallinternational law grants warships an extraterritoriality as floating portions of their flag states and as such entitles them to immunity from the jurisdiction of any state, not only on the high seas but in foreign territorial waters as well.[178] This immunity even extends to foreign ports.[179] Under currently applicable international law the warships of all nations are entitled to navigate the open seas without interference from any other state. This even extends to naval vessels engaged in intelligence-gathering activities.[180]

North Korea apparently does not dispute this right on the open seas since her communiques claim that the Pueblo was within her territorial seas and remained there after repeated

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[178]Oppenheim-Lauterpacht, supra note 51, at 282, 461, & 852-55. See also Svarlien, supra note 82 at 195, & Colombos, supra note 82, at 196.

[179]The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812). The United States Supreme Court held that as a matter of international law a state must give complete immunity to visiting foreign warships. McDougal and Burke, supra note 53, at 135 state: "So well established is this consensus that modern attempts to interfere with warships in foreign ports are virtually non-existent. . . ."

[180]The United States recognizes the right of the intelligence-gathering vessels of the Soviet Union to navigate and hover beyond the three-mile limit of the United States and its territories.

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[178] Oppenheim-Lauterpacht, supra note 51, at 783, 461, & 851-53. See also Brierly, supra note 83 at 417, & Colombos, supra note 80, at 295.

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requests to leave. This was the apparent basis for her act of seizure.

In time of war, capture and seizure of a belligerent's men-of-war is permissible.[181] As the North Korean authorities failed to refer to this at all, it could be argued that they did not consider a state of war to be in existence. This is further bolstered in their threats to treat the officers and crew of the Pueblo as spies. This would not be consistent for in a case of belligerency they must be considered as prisoners of war.[182]

At times other than wartime coastal states have the right to request that a foreign warship leave its territorial sea and complain to the vessel's flag state if the war vessel refuses to comply wherever the vessel has violated or continues to violate the coastal state's regulations. The coastal state can even forcefully compel the foreign war vessel to depart its jurisdiction.[183] Nevertheless, it is a fundamental rule that warships cannot form the object of a seizure, arrest, or

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[181]U.S. Naval War College, supra note 146, p. 56. See also p. 397, Law of Naval Warfare, art. 503(a)(2): "Enemy warships and military aircraft may be captured outside neutral jurisdiction. Prize procedure is not used for such captured vessels and aircraft because their ownership immediately vests in the captors' government by the fact of the capture."

[182]Id., p. 399, art. 511(a).

[183]Colombos, supra note 92, pp. 194 & 196, & Oppenheim-Lauterpacht, supra note 51, pp. 854-55.

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[102] Id., p. 397, art. 511(a).

[103] Colombos, supra note 91, pp. 194 & 199. & Oppenheim-Lauterpacht, supra note 51, pp. 529-52.

detention by any legal means whatsoever or by any judicial process.[184] Therefore the law is clear and North Korea's seizure of the Pueblo is illegal per se and constitutes a grave breach of international law.

Yet North Korea can argue successfully that she had a legal right to seize the vessel. Her propaganda implied her case under the Armistice at the time of the seizure although, possibly due to an inadequate forum, she never presented an adequate legal defense.

Assuming that the Armistice was not a de facto termination of hostilities but rather a general armistice agreement in the classic sense, seizure of the belligerent's man-of-war is probably permissible under international law, even during the period that the armistice is in force.[185] Of course, if the United States intelligence-gathering activities are completely independent of United States activities as part of the United Nations Unified Command, the United States might not qualify as a belligerent. Much depends on the nature of the United States position.

On the other hand, granting that the Korean Armistice is an actual termination of the de facto war, as I believe the evidence indicates, the North Korean actions can still be justified under the Armistice.

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[184]Colombos, op. cit., p. 196.

[185]See note 168 supra.

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[194]Johnson, op. cit., p. 138.

[195]See note 189 supra.

Article II, paragraph 12 of that Agreement requires that:

> . . . the Commanders of the opposing sides shall order and enforce a complete cessation of all hostilities in Korea by all armed forces under their control including all /naval/ units. . . .[186]

Paragraph 15 of the same Article continues:

> This Armistice shall apply to all opposing naval forces, which naval forces shall respect the waters contiguous to the Demilitarized Zone and to the land area of Korea under the military control of the opposing side. . . .[187]

Were the Pueblo within the territorial seas of North Korea it would appear that the Armistice agreement was violated. Consider the broad language of this paragraph: ". . . shall apply to all opposing naval forces. . . ." This could be interpreted to mean either all naval forces of the various countries participating, as they are attached to the Unified Command. Or it could refer to all the naval forces of all the participating countries, whether or not they are under the Unified Command or operating under orders directly from their governments. The latter interpretation appears to be the better one, for all hostilities were to cease. Thus the violation of the Armistice agreement could justify the action taken by North Korea for the extremity of the action must be measured against the gravity of the provocation presented by that vessel's location and activities.

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[186] 4 U.S.T.I.A. 239 (1953); [187] Id., at 243.

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> . . . the Commanders of the opposing sides shall order and ensure a complete cessation of all hostilities in Korea by all armed forces under their control including all [naval] units. . . .[10]

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[10] 7 U.S.T.I.A. 230 (1953); [11] Id., at 243.

Granting for a moment that the Pueblo never entered North Korean waters but at all times remained beyond the twelve-mile limit, there is still justification for the seizure as a violation of the Armistice Agreement. Notice the words "shall respect the waters contiguous to . . . the land area of Korea . . . of the opposing side." The meaning is hardly explicit. This resulted from a failure to agree on terms. The United Nations Command recognized a maximum permissible breadth of the maritime belt at three miles. North Korea would agree to nothing less than twelve miles, and the Republic of Korea maintained its "Rhee Line" which extends from 60 to 200 miles from that country's coastlines.[188] This vagueness could result in a claim by North Korea that its contiguous zones extend beyond twelve miles under the Armistice Agreement.

Secondly, the North Koreans could argue that they have contiguous security zones extending beyond twelve nautical miles from their coasts. The United States itself has exercised such broad limited-jurisdictional claims, and what is sauce for the goose is sauce for the gander. The 1958 Convention on the Territorial Seas and the Contiguous Zone, Article 24[189] limits the maximum contiguous zone to a claimed distance of twelve miles from the base line used to measure the territorial seas and also to purpose, security being not mentioned in permissible

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[188]Levie, supra note 168, at 906.

[189]U.S. Naval War College, supra note 32, pp. 200-01.

uses. Since the 1958 Conventions are not established as international law, only signatories to the Conventions are bound by these limitations. The United States, but not North Korea, is a signatory.

A third argument to justify the actions of North Korea is the claim that the Pueblo encroached upon North Korean territory--if not physically, then unquestionably by the incursion of her radar and intelligence-gathering apparatus into the airspace and sea space within her jurisdiction. Such actions were closely akin to the actions of other ships which hovered off the coasts of the United States although not bound for United States ports, in order to deliver their illicit liquid cargo in defiance of the laws of the United States.

This last argument is equally convincing without the support given by the terms of the Armistice Agreement. Recall the development of and the current status regarding the law of the territorial seas and the contiguous zone briefly set out in an earlier section of this paper. Although the navigation of coastal seas by foreign men-of-war may be permitted (it is doubtful that North Korea would have to accept this ashher seas do not constitute an international strait), hovering within foreign coastal seas of a state is nowhere in international law condoned outside of emergency situations. Neither the Corfu Channel Casennor the 1958 Convention could be extended to incorporate the toleration of the hovering of a foreign man-of-war

within the territorial seas of a coastal state. This violation of North Korea's quasi-sovereign territory requires that North Korea have a legally justifiable alternative to prevent such challenge to her integrity. I suggest at this point that North Korea's actions are not unreasonable.

For the sake of argument, and to reduce the confusing number of issues presented by the facts of this case, assume that the Pueblo was hovering immediately outside the territorial seas of North Korea and that she proceeded further to sea upon being challenged by the North Korean patrol boats--where she was captured. Assume further that the vessel was on a mission totally unconnected with the Unified Command of North Korea, thereby eliminating the difficulties presented by the clauses of the Armistice Agreement. Assume further that the United States can in no way be linked legally to the Korean hostilities of the early fifties, so that North Korea cannot claim the United States is a "hostile power" by reference to the United Nations police action. The North Korean authorities still retain a justification for their actions under the inherent right to self defense.[190] Exactly how extensive this right is, especially

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[190]See McDougal and Feliciano, Law and Minimum World Public Order (New Haven: Yale Univ. Press, 1961), p. 174 et seq., wherein consideration is given to the attempts to limit the right of self-defense under the United Nations Charter to discourage its indiscriminate use by potential aggressors and yet maintain the right insofar as necessary to maintain and preserve international peace and friendly relations among nations.

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in light of the United Nations Charter, requires serious consideration. This will be considered below in more detail. But, considering the difference in size and power of the participants in the Pueblo seizure, the relative threat to the values of each state represented by the presence of the foreign man-of-war,and the values each sought to protect by its activities, the North Korean authorities can support substantially the claim that their actions were necessary to preserve their territory from United States aggression.

C. Aggression, Self Defense, and the Pueblo

As the seizure of a foreign warship is not permitted under international law, such an act could be considered by the victim state as an act of war. It is a clearly aggressive act even where done under a defensive aspect. Today the world is attempting to develop a world public order system which can successfully cope with the crises situations which develop between nations and peoples. Especially since World War I, thelleading nations of the world believed it vital that warlike acts be curtailed. Their efforts led to the establishment of world diplomatic organizations and to attempts to define "aggression" so that such acts could be quickly condemned and the perpetrators punished.

In 1919, the League of Nations was created in the first, although unsuccessful, attempt to prevent international wars

as a means of settling disputes between countries.[191] The Kellogg-Briand Pact[192] (Pact of Paris) of 1928 specifidally outlawed resort to war to solve international controversies and bound the contracting parties to solve all international disputes solely by pacific means. Among the original fifteen signatories to the Pact were Germany, Japan, Italy, and the U.S.S.R.[193]

These noble attempts resulted in failure and World War II only increased the desire for a permanent end to war on the part of the nations of the world. The United Nations Charter represented a renewed attempt to create a multinational forum in the continued belief that such a body is needed to cultivate friendly relations among states. The purposes of this organization are among others: (1) to maintain international peace and security; prevent and remove threats to the peace; suppression of acts of aggression or other breaches of the peace; (2) to bring about by peaceful means adjustment and settlement of international disputes; (3) to develop friendly relations among

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[191]The Covenant of the Leage of Nations began: "In order to promote international cooperation and to achieve international peace and security by the acceptance of obligations not to resort to war, . . ." See L.B. Sohn, Basic Documents of the United Nations (Brooklyn: Foundation Press (2d Ed., 1968), p. 295.

[192]46 Stat. 2343, 94 L.N.T.S. 57.

[193]Bishop, supra note 161, p. 755.

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[92]64 Stat. 1541, 94 U.S.C.A. 67.

[93]Bailey, Peace has [illegible], p. 787.

nations, and (4) to solve economic, social, and other problems through international cooperation.[194]

In pursuit of these goals Article 2(4) of the Charter requires that:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.[195]

Article 51 of the Charter balances this restriction on the use of arms by recognizing the need for self-defense.

> Nothing in this Charter shall impair the inherent right of indiviual or collective self-defense if an armed attack occurs against a Member of the United Nations.[196]

The United Nations Charter was framed so as to deliberately avoid the term "war" as well as a specific definition of "aggression," although it clearly attempted to provide adequate sanctions against the possibility of future armed hostilities.[197] Since the United Nations began to function repeated attempts have been made to adopt a specific definition which would include all actions constituting aggression. This has yet to be accomplished. On one side of the debate are those states which want aggression defined because they believe that the use of effective sanctions would be enhanced

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[194]United Nations Charter, Art. 1.

[195]Sohn, supra note 191, p. 2; [196]Id., p. 12.

[197]United Nations Charter, Chapters VI through VIII.

nations, and (4) to solve economic, social, and other problems through international cooperation.[194]

In pursuit of these goals Article 2(4) of the Charter requires that:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations.[195]

Article 51 of the Charter balances this restriction on the use of force by recognizing the need for self-defense.

> Nothing in this Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.[196]

The United Nations Charter was framed so as to definitely avoid the term "war" as well as a specific definition of aggression.[197] Although it clearly attempted to provide adequate sanctions against the possibility of future armed hostilities,[198] since the United Nations began to function repeated attempts have been made to adopt a specific definition which would include all actions constituting aggression. This has yet to be accomplished. On the side of the dangers that these efforts imply that aggression defined narrowly enough to [illegible]

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[194]United Nations Charter, Art. 1.

[195]Bowett, supra note 191, p. 77; [illegible] 194, p. 51.

[196]United Nations Charter, Chapter VI passim xxii.

and that the would-be aggressors could more easily be identified, thereby discouraging all forms of direct and indirect aggression. Other states, including the United States,consider that attempts at a sufficiently comprehensive definition of "aggression" are futile and that anything less in scope would be harmful since it would curtail the ability of the United Nations to respond to threats to the peace by virtue of the definition, while potential aggressors, having the adopted definition before them, could insure no United Nations interference by limiting their aggressive hostilities to activities beyond the scope of the definition.[198]

The United States fears that an officially adopted definition would create a burden on the Organization with which it might be unable to cope, since it is already limited in its responsive capacities through the need for permanent member agreement in the Security Council. The difficulties are further increased by the fact that frequently aggression is claimed to be merely the exercise of the right of self-defense by the nations engaging in the armed hostilities. The Soviet Union proposed a listing of examples of direct aggression and included such factors as the State which first declares war against another state, or invades, bombards, or lands troops therein without permission; engages in Naval Blockade or supports armed bands which engage in attacks on a nearby state.

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[198]McDougal and Feliciano, supra note 190, pp. 61 & 62, n. 149.

The Soviet definition also includes forms of indirect aggression such as encouraging subversive activities or promoting civil war, and gives examples of economic and ideological aggression.[199] The Soviet definition could result in labelling the United States attempts at containing Communism as aggression, requiring an embarrassing loss of face for the United States if embraced by the United Nations.[200] This would give an open door to Communist expansionist activities in the form of "wars of national liberation" which, due to the clandestine activities of the communist states not Members of the United Nations, could not be successfully labelled as aggression or dealt with either by the United Nations or by the United States under the theory of collective self-defense. In the present world order system it is to the advantage of the free world that no definition of aggression has been forthcoming, for the hands of the free world would be tied in the face of an imperialistic philosophy known as Communism.

Since a definition has yet to be agreed upon, the determination of what constitutes an aggressive act remains a subjective test. Each nation applies the term as it finds useful and appropriate to justify its own actions and condemn the acts of other states before the world.

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199. R.V. Hansen, "Defining Aggression - United States Policy," 21 Naval War College Review 80, at 93 & 94 (Dec. 1968).

200. Id.

Perhaps the most workable definition of "aggression," suggested by Professor McDougal, is that form of uninvited interference which is directed by one state or group of states, either by the direct participation of or with the encouragement or support of its officials, against another state or group of states in a manner directly destructive of the basic values of the target state or the world at large.[201] This definition provides a workable frame of reference in which to consider the Pueblo Incident as it is,with violent, as opposed to peaceful, means of persuasion by which the North Korean goals were accomplished.

The use of armed force is permitted, under the Charter, in two situations which cannot be labelled as ?aggression," and therefore can legally be used: action taken by the Security Council or, if necessary, by the members of the United Nations separately under General Assembly action pursuant to the "Uniting for Peace" Resolution of 1950, to maintain international peace and security or prevent a threat to the peace, and by states individually or collectively, under the inherent right of self-defense. Armed enforcement actions under the United Nations Charter are not applicable to the coercion situation created by the Pueblo Incident, nor do they present difficult legal questions in themselves for such action is not classified

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[201] McDougal and Feliciano, supra note 190, chap. 1.

as aggression by rational decisionmakers nor is such action pursuant to anUnited States determination challenged covertly by Members of that Organization, for world opinion will almost unanimously support a United Nations decision. It is outside of that Organization that difficult issues arise when both sides claim that they are engaging in an action of self-defense while their enemy is the aggressor. The concept of self-defense must be examined as both participants claim that self-defense was the motive for their actions--which led to a world crisis on January 23, 1968.

> The right of self-defense under general international law is as vague as it is unquestioned, and as liable to abuse in its application as it is indispensible in the present phase of the international society.[202]

The claim of self-defense is most conspicuous when it is used in response to a violent and substantial military attack initiated against it, such as the response of the United States to the attack on Pearl Harbor, Hawaii, by the armed forces of the Japanese Empire in December 1941. Less obvious and more difficult to assess are claims of self-defense where one participant attacks another to prevent an anticipated attack by him. This was the claim of the Israeli Government when it initiated the actual armed warfare against its neighbors in June 1967. The difficulty here is that the attacking state is

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[202]Stone, supra note 139, p. 243.

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[202] Bowett, supra note 179, p. 242.

making a value judgment that may or may not be accurate and, regardless of the truth, the various states in the world arena will support their ally against their (and his) enemy. This response by allied states prevents, frequently for long periods of time if not permanently, an adequate or timely appraisal of the situation by a neutral body. A third type of assertion of self-defense is coercion against third states, even a non-participant in the original conflict, by one belligerent in order to prevent injury through the assistance, either intentional or inadvertent, by that third state which could allegedly cause grave injury to the state using coercion. The British destruction of the French Fleet in the Mediterranean in 1940 after the German victories in Western Europe, to prevent Germany from acquiring it, serves as an example. This type too requires self-determination, and is thereby subject to dispute as to who is the aggressor and who is the defender. These claims are frequently asserted as self-defense or self-preservation or necessity. None of them, except perhaps for the first, are actually a response to a threat against independence or to territorial integrity of the acting state.[203]

The right of self-defense requires that the action taken

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[203] McDougal and Feliciano, supra note 190, p. 209 et. seq. See also W.T. Mallison, Jr., "Limited Naval Blockade or Quarantine Interdiction: National and Collective Defense Claims Valid Under International Law," 31 Geo. Wash. L. Rev. 335 et seq. (Dec. 1962).

be necessary and in proportion to the threat facing the participant claiming the right. To analyze the problem at hand the variables recommended by Professor McDougal will be used[204] to answer the issues presented by the Pueblo-North Korean coercive situation, namely, an examination of the participants, their objectives, methods, conditions, and effects in order to determine whether the current international public order system can solve the dispute and, if not, what is required.

D. The Parties to the Incident in the Light of the Situation

1. The Participants.

It is first necessary to identify the participants in order that the dispute may have focus. Immediately involved are two: the united States of America and the People's Democratic Republic of Korea. On the next level are the U.S.S.R., the Republic of Korea, and the United Nations. These latter are interested incidentally and participate not as immediate decision-makers in the seizure, but as interested observers and potential actors in the conflict. The U.S.S.R. created the North Korean Government and maintained that the Korean "war" was an internal matter involving Korea at the time the Republic of Korea was invaded.[205] Secondly, the Soviet Union,

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[204] McDougal and Feliciano, op. cit., p. 220 et seq.

[205] Id., p. 221.

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[204] Schwelb and Pelcovits, op. cit., p. 130 et seq.

[205] Id., p. 131.

as a state which utilizes intelligence-gathering vessels, will be interested in observing the United States reaction as an experience she herself could suffer as a similar embarrassment.[206] Thirdly, as an ally and protector of North Korea, an enlarged conflict could draw the Soviets into the dispute.

The United Nations is virtually always involved in such crises as that Organization is responsible for the maintenance of international peace and security. A special interest exists in this case because of the United Nations previous and continuing commitment to South Korea which, if not a universally recognized state, is, at least, a distinct and relatively permanent territorial unit which that Organization is obliged to defend.[207]

The Republic of Korea relies upon the United States for guidance and protection against the enemy government of the North. She sees the seizure of the Pueblo as a test of the strength and courage of her defender, without whom she would

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[206] N.Y. Times, June 12, 1968, at 6, col. 6. It was reported that the Soviet intelligence vessel Kegostrov was released by Brazil after the Soviet Union apologized and paid an indemnity. The vessel was seized on May 4, 1968 or thereabouts by the Brazilian Navy two miles off the coast of Brazil. The vessel was released on May 24, 1968, about twenty days after the seizure. The handling of this situation indicates that the Soviets learned something from the United States experience. This was handled quietly and swiftly. Russia did not make a big show of it because the options opened only made the large power look helpless. The Soviets paid the fine and let the matter rest.

[207] McDougal and Feliciano, supra note 190, p. 221.

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[207] Kaczorowski and Politano, supra note 199, p. 291.

probably not survive. She considers retaliation not as a possible igniting force for a world conflagration, but rather as a confirmation of her ally's loyalty.

The primary participants in this affair are the "owner" and the "seizer" of the Pueblo. The United States is the wealthiest and most powerful nation-state the world has known. In the relatively short span of one hundred and fifty years this country grew from a rebellious colony of Great Britain to be twice the savior of Europe and the defender of the free world.[208] The United States has always been linked to West Europe and at least grew up in those international law traditions if not actually and at all times a participant and contributor in its development. Therefore, the United States could easily accept, adhere to, and even embrace international law for it was conducive to an economy and social order compatible with that of the United States. Even the political order was similar, as the President was akin to and enjoys the powers of a monarch in the field of foreign affairs.

North Korea, on the other hand, is an aberrational state. The Korean Peninsula was for centuries one state. World War II and the subsequent occupation divided the country in the center. The southern half of the Peninsula established a government by free elections under the supervision of the

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[208] See Bailey, supra note 3, for an interesting overview of the development of the United States from an international perspective.

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United Nations. The northern half is ruled by a regime created and imposed upon the people by the Soviet occupiers. This "state" is recognized solely by the communist bloc of nations. The great majority of the United Nations members recognize the government of the Republic of Korea as the only properly installed government of that Peninsula. This Republic is a strong democracy, growing increasingly powerful. The North depends on its ally, the Soviet Union. It has never participated in the development of international law. It is kept outside the workings of that law by the international community of nations. It is a very small and weak state. Although it is technically required and expected to observe international law, it is denied an international forum with regard to its external disputes. In comparison with the United States, a great nuclear power, the People's Republic of Korea is almost insignificant in might. Its actions therefore must be observed not only against the requirements of the Law of Nations, but against the propriety of the actions of the United States as well.

2. The Claimants' Objectives Regarding the Pueblo and its Seizure.

The United States, a major creator and sponsor of the United Nations, had hoped thereby to maintain the status quo in the world following the Second World War. Europe was to be rebuilt; the defeated nations were to lose their conquered territories and Germany was to be temporarily divided; no

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7. The Claimants' objective regarding the Pueblo and its Crewmen.

The United States, a major creator and sponsor of the United Nations, had hoped thereby to maintain the status quo in the world following the Second World War. Europe was to be rebuilt the defeated nations but to have their economies restricted and Germany was to be permanently divided as

states was to be humiliated, and the five great powers were to benevolently and firmly cooperate in maintaining the peace and preventing world conflagration.

The United States soon became disillusioned with the ability of the United Nations to fulfill its purposes. The Soviet Union succeeded in setting up puppet regimes in every Eastern European and Asian nation she occupied. One author claims that she also assisted in the defeat of Nationalist China at the hands of Mao Tse-tung.[209] At the same time, the Soviet Union prevented United Nations interference by the use of her negative vote and a technique called the "double-veto" to undermine the deliberations and actions of the Security Council. In June 1950, with the absence of the Soviet representative, the United Nations succeeded for the first time in repelling an invasion of South Korea--a threat to world peace. The United States came to rely on regional arrangements to contain Communism. This was viewed as legitimate self-defense under Article 51 of the United Nations Charter. The United States considered that in saving the weaker nations from being overtaken by communists, whether local or alien, it was actually defending the United States. For the values involved--liberty, freedom, and the right to pursue one's own destiny--were both inclusive and exclusive in nature. The economic structure of

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[209] Bailey, supra note 3, pp. 746, 764, 780, 790, 817, 831 & 863.

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[203]Manley, supra note 3, pp. 749, 756, 780, 790, 817 & 821.

the United States virtually required a free world in order to survive and function for trade was essential to its operation. Much more important was that the principles upon which this country was founded required that, as it was now a world leader, it must universally defend and protect these inalienable rights--not only for ourselves but, as custodians, for other nations around the globe. The United States had hoped such pursuits would be a world effort, but the United Nations was not capable of the task as the United States saw it.

The immediate objectives of the United States in its use of the Pueblo was the acquisition of information. This was for defensive purposes as the United States saw it. Its obligations to South Korea required that all available information be gathered for defense should an attack come from the North. The North was considered as an avaricious power, ready to forcibly absorb South Korea and reunite the country. The increased agitation and infiltration in the five months preceding the Pueblo seizure in fact justified United States concern.[210] Indeed, this participant hoped that continued surveillance and patrol would reduce the pressure on the South.

With the United States already occupied in South Viet-Nam it is unlikely that there was any intent by that power to invade or in any way commit what could be called direct aggression against the North Korean territorial integrity or political

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[210]Chap. II, supra.

[316] Chap. II, supra.

independence at that time. Rather, intelligence-gathering was considered as a method of self-defense. As the Pacific Ocean was no longer considered enough assurance of protection for the United States, its allies must be kept strong and confident of United States assistance. From the United States viewpoint the use of intelligence ships was not considered aggression or a violation of international law.

The North Korean objectives were of a different nature. That government considered its southern counterpart a puppet. regime, and like its southern neighbor desires a reunification under its own authority. North Koreans have for some time violated the Armistice Agreement to further their government's objectives, the boldest effort being the attempted assassination of the President of the Republic of Korea.[211]

The immediate objectives of the People's Democratic Republic of Korea in seizing the Pueblo must be surmised as proof is not available. Certainly that government wished to halt the leak of military, geographical, and communications information to the United States, the secrecy of which it considered valuable, if not vital, to its defenses. Undoubtedly they hoped that such intelligence-gathering missions might stop due to the inability of the United States to defend such missions or to the clamor raised by irate nationals in the United States. It is probable that it also desired to weaken

[211] Chap. II(A)2, supra.

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[11] Dunn, 13(A)1, supra.

the alliance between the United States and South Korea by showing the latter that its protector was a "paper tiger," unlikely to risk another war in Asia for South Korea--regardless of the provocation.

In addition, it appears that the North Korean Government, ignored by its allies and lagging behind its enemy in development, wished to bolster its image with its friends and generally improve its position among the communist states and its own people by showing "a threat" to its existence and a courageous act of retaliation.[212]

These goals are certainly of a defensive nature. Unless some bold action was taken against the South and its ally--the United States, the South might invade the North. But if the purpose of the seizure lay solely in impressing the dissatisfied people within the Democratic People's Republic, that indeed there was a crisis so that Kim's regime would continue secure, the seizure becomes aggressive and illegal and the claim of self-defense could no longer be easily supported.

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[212] N.Y. Times, Jan. 30, 1968, at 8, col. 4. Observers reported prior to the Pueblo Incident that the regime of Kim Il Sung was in trouble, beset by economic and political difficulties. The North Korean Government was having problems with the U.S.S.R. and experiencing a cooling of relations with Red China. A number of top-echelon party personnel had been purged. Kim Il Sung wanted his people to have more tothink about than high taxes and a stagnating economy to support a tremendous military machine.

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3. The Methods Used by the Claimants to Win Their Objectives.

The United States never claimed its use of intelligence-gathering vessels in the Sea of Japan was self-defense but rather that it was an activity permissible, or at least not prohibited, under existing international law. This is only a partial explanation. The use of chemicals and biological weapons of massive destruction were not prohibited as a matter of international law during either world war, yet neither side used such weapons because the result was unnecessary, extreme, and wasteful of resources, and the sanctions against such activity were substantial.

The use of these vessels was considered acceptable because they were only coercive insofar as the one side knew the other was acquiring information with every communication it made. No military coercion existed. The sanctions were adequate in that both sides could seize the other's vessels, if necessary, in retaliation for a similar act on the other side. Both could look to the law of the sea to enforce their rights to maintain such use of the open sea under customary international law. The Soviet Union and the United States, being great naval powers, have equally as much to gain or lose by ignoring the freedom of the open seas, as they understand it, regarding intelligence vessels.

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especially submarine and aircraft communications systems. These vessels themselves pose no threat of immediate hostile armed attack nor do they precede one. Rather, they seem to serve as a warning to their "victim" that prudence is the best course to follow. The use of such vessels appears to be a means of self-defense, rather than aggression. However, there must be aggression before self-defense is justified, certainly on the level of armed hostilities. Here, no armed hostilities existed between North Korea and the United States. No doubt a threat existed, as North Korea considered South Korea and the United States enemies. The activities of the North against the South were undoubtedly hostile. The presence of the Pueblo was chosen as a heretofore permissible alternative to retaliatory raids which, while not actively harmful, would not only provide useful information in the event of a conflict but would discourage further incursions into South Korea.

The North Koreans, on the other hand, claimed strict observance of the Armistice and considered the Pueblo as a threat to her military defensive shield. As a response to this threat she had many modalities of self-defense under international law to choose, in order to settle her dispute with the United States regarding the Pueblo: diplomatic, mass communications, economic and social pressures, and armed force being the most common. Granted that economic and social pressures could not successfully be brought to bear against the

United States by North Korea since neither economic nor social interrelationships exist between the two parties, there are other non-military coercive tactics available. North Korea apparently made an attempt to use mass communications by broadcasting warnings concerning the continued use by the United States of "spy ships" off the coasts of Korea and its readiness to act against them shortly if their use continued. This occurred shortly before the Pueblo was seized.[213]

Official diplomatic avenues were not readily available since neither nation recognizes the other or maintains official missions in the other's capital. Although the Military Armistice Commission at Panmunjom was chosen as the forum to settle matters after the seizure, the North Koreans did not use it as a means of declaring their displeasure at the presence of the vessel. Whether this was because they felt that it was a dispute solely between the United States and themselves, unrelated to the Armistice and the United Nations Forces, or because they believed negotiations of any kind would be fruitless, they chose to act through military coercion to bring to an end an odious snooper. It is possible that military coercion was chosen because it was the only modality which served the

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[213] N.Y. Times, Jan. 27, 1968, at 1, col. 6. A Japanese newspaper, Sankei Shimbun, said that North Korea had warned of its readiness to act against the Pueblo two weeks before the incident occurred. The broadcasts did not refer specifically to the Pueblo but rather to the United States "spy ships" gathering information while sailing in the midst of South Korean fishing fleets.

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objectives sought after. If this is the case, those objectives would be coercive rather than self-defensive in nature. The choice made--seizure of the vessel and its crew--when the vessel could have been forcibly driven off, out of the coastal seas or even beyond any claimed adjacent contiguous security zones, especially when viewed together with the demands of the North Korean Government upon the Government of the United States, indicates an apparent preference for aggressive tactics by the North Korean authorities which weakens their claims that they acted only in self-defense.

4. Limitations in Claims of Self-Defense.

> The very conception of self-defense implies that the purpose of the defender is to conserve its values rather than extend them through acquiring or destroying values held by the opposing participant.[214]

The principle of conservation requires that only an effort necessary to stop or repel an invasion of rights may be adopted to the threatened party.[215] Just as a massive attack permits a massive retaliation, a minor invasion of rights or an interference with lesser values allows only a response sufficient to prevent the denial of those rights.

In the Corfu Channel Case[216] the International Court of Justice held inter alia that Great Britain did not violate international law by her naval vessels transversing the Corfu Channel, an international strait, with guns manned and at the

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[214]McDougal and Feliciano, supra note 190, p. 222; [215]Id.

[215]1949 I.C.J. Rep. 4, at 169.

ready since the Albanian armed interference prior to this transnavigation (during which the British naval vessels suffered substantial damage from mines located in the channel) entitled the British to this action as a means of self-defense, thus not depriving the transversal of its innocent nature under international law.

This decision would appear to favor the United States position in regard to the Pueblo seizure. The Pueblo represented no armed threat to the North Koreans. The values the United States was attempting to preserve in maintaining the Pueblo in the Sea of Japan were "enlightenment": the acquisition of information of a scientific and military nature for the security of the South Koreans as well as its own personnel; "well-being": the protection of its personnel in South Korea and to maintain the peace and security of the world by discouraging an incursion into South Korea by the North Korean forces; "respect": by demonstrating to its allies and enemies that the United States would honor its commitments around the globe by performing its obligations as it considered necessary for their defense; and, "power": in that the information acquired would contribute to the arsenal of alternatives and weapons at its disposal if hostilities do erupt.

At the same time, the values "threatened" by the presence of the Pueblo appear, to Western eyes at least, to be comparatively insignificant. The territorial integrity and political

independence of North Korea was in no way threatened. The "well-being" and "self-respect" of that Government was affected in an internal manner as loss of face was felt by the vessel's presence. But neither South Norea, nor the communist allies of the North, nor the world at large would respect the People's Democratic Republic of Korea less due to the presence of the Pueblo in the Sea of Japan. The "power" value was not substantially affected or diminished as a result of the intelligence ship's presence, and it is difficult to see how the internal power ofthe Government could be in any way detrimentally affected.

As Professor McDougal points out, the denial of inconsequential or trivial rights or value claims even by armed interference warrants appropriate remedies, retaliations, and reciprocities other than high-level coercion.[217] Therefore, permissible self-defense is the right to exercise otherwise illegal high-level military coercion to protect important and substantial values--thereby implying the need for "necessity" and "proportionality" in response to any attempt at the invasion of substantial values.

Had there been any real threat of invasion by the United States based on the presence of the Pueblo, how much greater would the invasion of North Korea be after it seized a military

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[217] McDougal and Feliciano, supra note 190, p. 227.

[117]Kissinger and Feldstein, supra note 109, p. 747.

vessel and its crew belonging to a far stronger nation than itself. The threat to the primary values of the nations attacked must always be kept in mind, for nations sincerely seeking to maintain a peaceful world public order system will not seize any and every incident to claim the right of self-defense and proceed to launch a violent retaliation on the state or its instrumentalities which allegedly caused the first injury. Therefore, while the response of the North Korean Government to the presence of the Pueblo is not sanctioned by international law, a United States response to the seizure of the Pueblo cannot logically extend to full retaliation under the doctrine of self-defense. There is an evident distinction between the seizure of a foreign man-of-war, though clearly not permitted by international law in peacetime, and a threat to the territorial integrity or the political independence of the nation whose vessel is seized sufficient to justify a high level of military coercion made legal by a claim of self-defense.-- Just as the United States failed to declare war on Japan for the sinking of the Panay, a small military vessel in China[218] but did not hesitate to do so after the Japanese attack on Pearl Harbor on December 7, 1941. The difference in value destruction and appropriate and necessary response is evident.

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[218]See 15 Bull. of Int'l. News 9 (1938). The Japanese sank the USS Panay in the Yangtze River when they were invading China.

5. The Conditions Needed to Justify Claims of Self-Defense.

Self-defense can be validly invoked only after a rational consideration of the factual elements involved. The relative size and power of the participant charged with aggression, the nature and consequences of the objectives, the character of the power's internal structure, the type of coercion applied, the world public order system it desires, and its expectation of community intervention expected are all factors to be considered.[219]

Undoubtedly North Korean decision-makers, in deciding to seize the Pueblo, considered the above factors prior to choosing the course they would follow. They realized that the United States was immeasurably larger and more powerful than North Korea. This, standing alone, would discourage any retaliation in the form of a seizure. However, other aspects had to be considered. The Soviet Union could be expected to be as desirous of protecting the existence of the People's Democratic Republic of Korea as the United States was anxious to maintain in existence the Republic of Korea. This western monolithic state was engaged in a land war in South Viet-Nam which severely limited its ability to respond elsewhere. The United States objectives were preventive in that it wanted to deter an invasion of South Korea. Therefore the "aggression"

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[71]Rosenthal and Feliciano, supra note 1xv, p. 320.

claimed by North Korea against the United States through the Pueblo must rest in its taking information which, due to the nature of that information, was in reality a threat to the existence of that Korean Government. For it could not be argued that the loss of prestige to North Korea created an interference with values considered vital to it or the world community. Certainly the United States did not want another war on its hands in Korea, and it was obvious that the Pueblo did not spearhead any projected invasion.

The internal structure of the United States also served to influence the North Koreans' decision. Since its institutions permitted popular pressure on the Government and the war in Viet-Nam was becoming continually more unpopular, a coercive response to the seizure of the Pueblo was not likely. North Korean authorities could see that the United States did not relish war and that its people considered human life a very precious commodity. These factors would serve as a leavening to prevent further violence after the seizure.

The coercion being applied by the United States was rather mild but it became intolerable for the North Koreans. Substantial face was lost by the presence of the intelligence ship and it feared that its allies were no longer particularly interested in its progress. In any case, the coercion was considered sufficient justification by the North Korean decision-makers, at least when considered with the remaining factors, to provoke the seizure of the vessel.

The United States wanted a relatively peaceful world and desired a world public order system in which it could prosper and grow and continue to be the great power that it was. In the North Korean view this would include some wars undoubtedly, as such is necessary in their view for a capitalistic economy to survive. Nevertheless, the United States was already involved in one war--a costly one--and the world generally resented United States efforts in Viet-Nam. Her allies traded with her enemies. A relatively free and unified world was necessary for United States prosperity, and all could be lost by new and more costly wars.

The United States could not have any illusions about world assistance in Korea. The Pueblo project was strictly a United States effort. The world community would hardly take any action against North Korea should it seize an American war vessel claiming "trespass." The Korean effort of the United Nations of the 1950's was the only attempt of that body to enforce world peace on unwilling participants. It was not likely to recur

The presence of the Pueblo was humiliating and the only means of preventing intelligence-gathering was to take a dramatic step. The United States would obviously insist that intelligence-gathering was legal under international law, based on the doctrines of extraterritoriality of war vessels and the right to use the open seas at will as long as the right

of others on those seas are not unreasonably infringed thereby. Therefore, neither negotiations nor driving out the vessels would serve a useful purpose. Only a seizure of one of the intelligence ships might successfully force the United States, based on world reaction and reaction at home, to cease the missions entirely.

Once the vessel was seized the United States, nor charging North Korea with aggression, was forced to consider the protagonist in light of the conditions existing at the time of the seizure.

Here was a relatively weak and insignificant entity. Yet North Korea had powerful and jealous friends and neighbors who would consider any substantial retaliation, such as a forcible attempt to recover the vessel, as a threat to their territorial integrity and political independence. In addition, such an effort would mean a second fighting zone thousands of miles from the United States, yet adjacent to the enemy;s sources of supply.

To the United States decision-makers, North Korea's objective would appear to be the elimination of the presence of American intelligence-gathering vessels near her shores together with an attempt to humiliate the United States by demonstrating that it could not defend its own vessels from seizure by a small Asian nation. This would, hopefully, disillusion the Allies of the United States, especially those

in Asia, regarding the capacity of that State to protect them. A general disrespect for the United States would be demonstrated throughout the world. In turn, Communist states would gain new regard for North Korea and her sinking image would be replaced by renewed cooperation and assistance from her allies.

The consequences, however, were light. The seizure was humiliating to the United States. But prestige is linked with power. The strength of the United States, and thus its power, is beyond the wildest imaginings of all but a handful of the nations in the world community. The loss of a single ship under the circumstances could not have affected the prestige of the United States. Therefore this primary objective failed. For the same reason, the secondary objective also failed. Various methods of intelligence-gathering continue regardless of the efforts of the North Korean authorities.

The net result is that as no base value of substantial importance to the United States was harmed by the actions of North Korea, no claim of self-defense will properly lie for United States invocation should that State desire to retaliate. Even if the United States decided that the affront required substantial retaliation as a proportional response to the extreme act of seizure of a foreign vessel of war, it must be remembered that the internal politics of North Korea--a dictatorship--effectively controls the people and could thus guide the populace not only to make retaliation difficult or

impossible but also could also result in harm to the innocent victim of the seizure--the crew of the vessel. There can be no argument that the coercive nature of the seizure was hostile and severe and intolerable under international law. Nevertheless, there exists no threat to the territorial integrity of political independence of the United States itself unless we adopt the fiction that a foreign man-of-war is a floating portion of the flag state. Under the circumstances such an approach would be less than rational.

Regardless of the world order system it desires, undoubtedly it would be in the nature of a communist dictatorial democracy, the policies of acting to accomplish ends regardless of the means clearly indicates that the acts of the North Korean Government was in fact aggressive. The world therefore would never rally to the support of North Korea, although the U.S.S.R. and Communist China might well assist her. It is equally certain that the world community would not rally to the support of the United States in an effort to recapture a stolen naval vessel of little importance to the world at large. The effort could well destroy the world and the risks are out of proportion to any possible advantage that could be gained from the enterprise.

The United States recognized at one time that "necessity" is the most important condition in the application of the doctrine of self-defense. The formula recognized as the

standard was declared by Secretary of State Daniel Webster in the Caroline Incident of 1837:[220] "necessity of that self defense is instant, overwhelming, and leaving no choice of means or moment of deliberation".[221] No longer is this formula recognized since it is unduly restrictive.[222] Nevertheless, the only justification for anticipatory self-defense as a legitimate means of coercion requires a goal less than invasion of another state's territory.

The invocation of self-defense to justify military coercion can only be legitimate and proper where substantial base values are being or may well be completely destroyed and where a minimum and limited response is made.

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[220]See R.Y. Jennings, "The Caroline and McLeod Cases," 32 A.J.I.L. 82 (1938). The facts were briefly as follows: The Caroline was a steamer used by individual U.S. citizens to help William L. MacKenzie, a defeated rebel leader from upper Canada, attempt another invasion of the British colony. The insurrectionists' activity, although strictly illegal, was not suppressed by the United States. Therefore the British took things into their own hands when, on Dec. 29, 1837, a volunteer party crossed over to the American side of the Niagara River and sent the Caroline over the Falls, aflame. At least one American was killed in the foray. This created a substantial international incident because this amounted to an invasion of the United States by the British Army unit which did the deed. The issue arose regarding what is self-defense and when may it be invoked. See also Bailey, supra note 3, p. 199 et seq.

[221]2 Moore International Law 409-414 (1906), and note 220, supra.

[222]Mallison, supra note 203, at 334-48.

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[221]Note, International Law 409-414 (1906), and note 220, supra.

[222]Williams, supra note 107, at 134-40.

6. Effects and Proportionality of the Responding Coercion.

The effects of the coercion, therefore, to legally permit the responding coercive action must not only be made necessary by the coercive acts of the participant to be charged with aggression, but likewise must itself be limited in intensity to that amount of force required which will properly and effectively secure the objectives permissible and sought after in the self-defense exerted.

The North Koreans may well be within their rights to seize the Pueblo in order to achieve their objectives if the Pueblo's activities constitute aggression. This assumes that no other less destructive means could be found to protect its interests. It is difficult to demonstrate that the Pueblo's activities were in fact aggressive.

The United States on the other hand was limited in its options to retaliate for the seizure. It is probable that the United States cannot claim any right of self-defense under existing international law since neither its territory nor its political independence, its economic strength, its government, or its people were seriously threatened by the incident, except of course the crew of the vessel which was captured with the vessel. As no necessity exists, any violence threatening the territory or political integrity of North Korea would be out of proportion and could justify a censure of the United States

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VI THE LIMITS OF CURRENT INTERNATIONAL LAW IN CORRECTING THE INADEQUACY OF THE PRESENT WORLD ORDER SYSTEM IN FACE OF A MILITARILY COERCIVE ACT SUCH AS THE SEIZURE OF A WARSHIP

A. The Result of the Incident Relative to International Law

The Pueblo Incident and its aftermath solved nothing as far as the desires of the protagonists were concerned, and yet reached the only possible solution necessarily outside of the world public order system short of an actual world holocaust. International law had no part in the solution of this difficult coercive situation, but rather the international facts of life determined the result. This situation differed from the Liberty incident, where Israel fired a missile at a United States vessel gathering information, because Israel was a friend, not an enemy.[223]

North Korea did not deter the intelligence-gathering activities of the United States, as was clearly demonstrated by

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[223] N.Y. Times, June 9, 1967, at 1, col. 6.

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the EC 121 Incident of April 1969.[224] That government may have harmed the prestige of the United States, but not in any significant manner. The North Koreans gained much information from the electronic gear and information on the vessel which is difficult to value.

The United States failed to get the vessel back, but succeeded in getting the men back, which certainly improved its image as a humanitarian state in the eyes of the world. The ship will be of little practical value to the North Koreans, although the Soviet Union could make some use of it as a vessel. No matter how costly, the United States will make the vessel and its equpment obsolete--thereby rendering even that acquisition valueless. Thus, the humiliations and recriminations between the principals to the dispute and their respective allies only worsen the distrust between the two worlds, and nothing of positive significance has actually been accomplished.

B. Acts Authorized in Intelligence-gathering Activities by States under International Law

As "spying" is sanctioned by international law, only if and when such persons are captured within the territory of

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[224] The Washington Star, Apr. 15, 1969, at 1, col. 8. It should be noted that the North Koreans apparently partially succeeded in their goals. No American intelligence-gathering ships are known to have sailed near the North Korean coasts since the seizure of the Pueblo, as of December 28, 1968. See Buffalo Evening News, Dec. 28, 1968, at A2, col. 3.

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another state where they are pursuing their activities are they subject to punishment as provided for such offenses under the municipal law of that state.

1. Space Spying.

The "spy in the sky" or the orbiting satellites are not prohibited by international law. Historically, international law was formed by the practice of states, as indicated by the development of the law regarding territorial waters described earlier in this paper. Only two nations are presently capable of engaging in placing orbiting satellites for information-gathering, or any purpose, into space. Both states have apparently decided to refrain from attempting to acquire title to any part of space, but rather keep space open and "free"--akin to the concept of freedom of the open seas. International law at present prohibits no activity in free space. Both states have orbiting satellites which report to their receiving stations in the launching state whatever is seen through cameras or heard through radio and radar receivers. Only the United States and the Soviet Union are capable of interfering with such activity or participating in it, and both have chosen by practice to allow such activities and to maintain a "peaceful space."

2. Activities in the Airspace.

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jealously guarded their airspace. The Paris Convention on Aerial Navigation of 1919[225] declares in Article 1: "every Power has complete and exclusive sovereignty over the air space above its territory.. . ." In addition, there is no right of innocent passage of any aircraft through the airspace above its territory except by treaty. The 1958 Geneva Conference on the Law of the Sea makes this quite clear.[226] The U-2 incident in May 1960 demonstrated what a clear violation of international law can mean in consequence of a failure of intelligence gathering through use of military aircraft.[227] Any violation of a state's airspace by a foreign military aircraft justifies that state in forcing that craft to land within its territory by any means and subjects the pilot thereof to prosecution.

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[225] 11 L.N.T.S. 173.

[226] Bishop, supra note 161, at 373. See Lissitzyn, "The Treatment of Aerial Intruders in Recent Practice in International Law," 47 A.J.I.L. 559 (1953). See also U.S. Naval War College, supra note 32, at 122, n. 133.

[227] In May 1960 a U-2 aircraft, flown by Gary Powers of the United States (of the CIA) was shot down allegedly by the Soviet Union while well within the latter's airspace. It produced at first a denial, and then an admission from top United States Government officials that the mission had been officially authorized to fly over the airspace of the Soviet Union in violation of international law. The result was a spy trial for Gary Powers and a refusal by the Soviet Prmier to meet with the President of the United States in a previously scheduled summit conference. See Encyclopedia Britannica 1961, Book of the Year, p. 355, for a terse review of the incident and its aftereffects.

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3. Intelligence Gathering Activities at Sea.

The Pueblo Incident added a completely new dimension to the intelligence-gathering systems of the great powers.

The Soviet Union and the United States accepted the fact that international law in providing for (1) freedom of the open seas and (2) the extraterritoriality of foreign men-of-war virtually protected intelligence-gathering in the open seas adjacent to the victim state as long as it was pursued under those mantles. Since such activity could not be prevented, both States used these activities for protection. Trespassing into foreign territorial waters could lead to an embarrassing "snafu" because these Powers did not wish to publicize their snooping activities, and the sanctions provided by international law entitled the other to drive off an interloper from its territorial seas. Such an occurrence would prove embarrassing. A seizure, however, was undoubtedly never contemplated by either side because it was considered legally impossible and undefensible and could create a very substantial international crisis.

C. Sanctions Against such Intelligence-Gathering Activities Provided by International Law

1. Sanctions Against Satellites in Space.

The sanctions against spying on outer space, besides those of a monetary or technological nature, would permit the state injured by such activity to (1) send a spy satellite up to snoop on the other party; (2) scramble and confuse the enemy satellite from its land territory; or (3) to launch diplomatic

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and other international efforts through international organs or local embassies to deter the "spying" state from its activities. To shoot down the "spy satellite" would be questionable at best because it would introduce violence to space, not to mention that the "fallout" from such an act of destruction could injure innocent third parties below. Space is free and can be so used as long as it does not interfere with the rights of others in space. As of now there is no law specifically providing sanctions for or against orbiting intelligence-gathering satellites.

2. Sanctions Against the Use of Airspace for Intelligence Gathering.

The sanctions provided for violations of a state's airspace by a foreign state's airships in time of peace are set forth in the Regulation of Aerial Navigation of 1919.[228] It provides that it can prohibit all private craft from flying over its territory for military or safety purposes, and that no military or other state aircraft of foreign states may fly over or land in a state's territory without permission. If such aircraft do "trespass" and then land in foreign territory, they are entitled to no extraterritorial privileges. Any foreign aircraft crossing a state's airspace can be forced to land within that jurisdiction and be subject to the laws of that state. No protection is granted by international law. If an

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[228] Oppenheim-Lauterpacht, supra note 51, at 519-21.

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[328] Convention-Documentary, supra note 11, at 316-33.

alien is suspected of spying he can be tried under the local laws. There is no "innocent passage" of aircraft in foreign airspace.

3. Sanctions Provided by International Law to Intelligence-Gathering Vessels on the Seas.

The sanctions available to a foreign man-of-war's presence in the seas off the coast of the victim state are quite limited in international law because of the protections granted to such vessels. Assuming that the 1958 Convention applies and has a status as international law, a foreign man-of-war beyond twelve nautical miles is beyond even the contiguous zones of littoral states and can use the open seas in any way she desires subject only to the limitation that such activity will not unreasonably interfere with the rights of others in their use of the open seas.[229]

But assuming that a violation of the territorial seas or the applicable contiguous zones by a foreign warship, the adjacent state can complain through diplomatic channels or, if necessary, drive the culprit out of its territory. Seizure is prohibited since a foreign man-of-war clearly possesses an extraterritorial status. Under present international law intelligence-gathering beyond the jurisdiction of the coastal state is as reasonable a use of the open seas as is fishing.

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[229]See the 1958 Convention on the Territorial Seas and the Contiguous Zone, art. 24(2). See also 1958 Convention on the High Seas, art. 2.

3. Sanctions Provided by International Law to Intelligence-Gathering Vessels on the Seas.

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Not assuming that a violation of the territorial seas or the applicable contiguous zones by a foreign warship, the aggrieved state can complain through diplomatic channels or, if necessary, drive the culprit out of its territory. Failure to prohibit along a foreign man-of-war clearly presents an objectionable potential status. Under present international law intelligence-gathering beyond the limitation of the coastal state is at reasonable use of the open seas as is lawful.

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[73] See the 1958 Convention on the Territorial Seas and the Contiguous Zone, art. 23(2). See also 1958 Convention on the High Seas, art. 2.

These sanctions work well between large nations with interests that encompass the world community. They will function almost perfectly where the interaction between the parties exists on a more or less equal plane. Both the United States and the Soviet Union use warships as intelligence-gathering media. A violation by one of these states against the other would bring an easily determined and proportional response--perhaps a seizure for a seizure, or such other action which could be taken where both states wish to maintain a good image in the world community.

International law provides no guidelines or sanctions regarding initial action or response to acts of an aggressive nature between small states such as North Korea and large states like the United States. North Korea has no intelligence ships against which the United States could take action. There is no forum in which she can be taken to task and made to account for her aggressive actions. North Korea has no interest whatever in recognizing a right to use intelligence vessels by other member states of the world community.

So, while international law capable of solving this problem is developing, it remains for the individual members of the world community of nations, especially the great powers, to control their behavior in response to acts taken against them which are unsanctionable under present international law. Only by such self-discipline can an answer to this dilemma

be found without the risk of a total destruction of the present world order process.

D. Ultra Vires Acts and Their Consequences

The seizure is quite clearly beyond the existing law as it is not a recognized sanction in international law. The "aggression" by the vessel cannot be considered so serious an aggression, if it is aggression at all, as to justify the violent military solution used by North Korean naval forces.

In 1866, an American sailing vessel, the General Sherman, sailed up the Han River to break the isolation of, and open trade with, the Kingdom of Korea. When the vessel reached what is now Seoul the tides ebbed, stranding the schooner on a sand bar. The Korean forces, on orders from the monarch, fired the vessel and massacred the crew. In the Spring of 1871 the United States sent a squadron of five ships under Rear Admiral Rofers to Seoul, and after being fired upon a landing party was dispatched to avenge the insult and the massacre. After destroying a number of Korean forts and killing over two hundred of the Korean forces in the rout, the squadron withdrew.[230]

The violence of the North Korean actions could have reaped a whirlwind of vengeance. At first the United States Government demanded immediate redress or threatened dire and drastic consequences which might well have been justifiable under

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[230] N.Y. Times, Jan. 24, 1968, at 15, col. 6. See also Bailey, supra note 3, at 314.

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In 1805, an American sailing vessel, the General Sherman, sailed up the Han river to break the isolation of, and open trade with, the Kingdom of Korea. When the vessel reached what is now Seoul the ships ended, stranding the schooner on a mud bar. The Korean forces, on orders from the monarch, fired the vessel and massacred the crew. In the spring of 1871 the United States sent a squadron of five ships under Rear Admiral Rodgers to Seoul, and after being fired upon a landing party was dispatched to avenge the insult and the massacre. After destroying a number of Korean forts and killing over two hundred of the Korean forces in the area, the squadron withdrew.[130]

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[130] N.Y. Times, Jan. 24, 1868, at 12, col. 5. See also Bailey, supra note 1, at 314.

international law and United States historical practice. Reason prevailed. The demand for the vessel's return was abandoned and a humble apology to the North Koreans secured the release of the Pueblo's crew. This did not come about through the legal sanctions provided by the jurisprudence under which the international community functions, but rather it was the international political situation which prevented a United States retaliation which might easily have led to a third global conflict in a century. For to seize a foreign warship in time of peace is clearly an "aggressive" act justifying a declaration of war even under the definition provided by the Soviet Union for United Nations consideration.[231] It serves as little consolation that the North Korean Government was right in its belief that the United States would take no step which would impair the lives of the eighty-two crewmen of the vessel, involve the United States in another Viet-Nam, or risk a third world war. Preservation versus destruction of the world lay in the victory of reason over pride, and most frequently in history reason is the loser.

The sanctions available to the United States in this case, short of bombing or invasion of Wonson where the Pueblo was first impounded, were minimal. North Korea is a nation which is

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[31]Hanson, supra note 129, at 93, where the Soviet Union's examples of direct aggression include: ". . . the carrying out of a deliberate attack on the ships of air-craft of (another nation)."

under the protective nuclear umbrella of a powerful world state. At the same time this little state will insist on determining its exclusive interests and values as well as its inclusive interests and values in the world community. North Korea has no world commitments or obligations and is interested solely in its own advantage and progress on a plane much below its nuclear-powered allies and enemies. It has only a small naval force and its nautical interests extend only so far as its fishing fleets ply the seas and to the edge of its limited demesne. The United States, with world encompassing power, has responsibilities of equal expanse. It cannot act carelessly and recklessly since every decision will undoubtedly have international implications. Her ships ply the world seas and her aircraft its skies, and its spacecraft probe the universe. The parochial values are not part of the United States concern for virtually all of its values, even its exclusive ones, are,because of the power of the United States, inclusive in its nature.

In short, North Korea could afford the gamble in seizing an American vessel of war. The United States dared not risk a vengeful retaliation, no matter how justifiable. Whatever navy North Korea has would dare not venture into the open seas alone, and thus the United States is deprived of even a proportional retortion. Any attack on the Korean mainland to recover the vessel would be intolerable to North Korea's allies and

unthinkable for the United States. For the United States would lose a vast amount of prestige should she so violently disregard the United Nations Charter, even if her actions would not mushroom into an international destruction of community values. Sanctions for large states against small states which do violence to international law do not exist effectively in the present world order system.

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VII CONCLUSION

The situation appears to leave an ultimate choice among three alternatives: First, we can condemn intelligence-gathering activities altogether, thus placing the burden of potential violation upon the powers which use devices to acquire otherwise unavailable information. Or, sanctions can be provided whereby some force is permitted by injured nations against those states who interfere with such activities so that the information-seekers can prevent the loss of their intelligence-gathering personnel and equipment. Thirdly, would be to require the states who are inquisitive to "assume the risk" of their activities. The decision rests upon which alternative will most minimize the risk of international conflagration and yet be most acceptable to the members of the community within the present world order system.

The first two alternatives are virtually impossible. Neither of the great powers, who failed to conclude a disarmament treaty because of lack of trust between them,will give up the right to gather intelligence. Without the cooperation of these states any decision by the remaining members of the community of nations is likely to have little effect. By the

VII. CONCLUSION

same token, the community of states will not accept any treaty or system of sanctioning power that interferes with their rights to keep the large nations from dominating their affairs. Effective sanctions against seizures are therefore unlikely to be acceptable to any nation. Either of these alternatives, even if adopted, would actually increase tension throughout the world. The banning of intelligence-gathering would increase fears and suspicions of the opponent by both sides. The result could be a greater possibility of an accidental nuclear conflagration. At the same time, a provision in international law to permit limited violence sufficient to prevent Pueblo-type seizures would only be a reversion to the "just war" concept of Grotius and further endanger the peace of the world. International politics require that the great nations work to maintain the confidence of the smaller nations within their sphere of influence, or risk losing them to the other side. The Soviet Union could never insist that North Korea return the Pueblo, because such an act would undermine any influence the Soviet Union possessed over that little state. Any new system tolerating intelligence-gathering likewise will fail for lack of adequate sanctions from the great powers' viewpoint.

As it is unlikely that the present world order system will experience any substantial change in the future toward accommodation of intelligence-gathering, only the actors can

provide protection for their interests in the area of securing information. In light of the current international power process, it is apparent that United States naval activities in the Sea of Japan was at least acceptable in international law and practice. In contradistinction to the Quarantine Interdiction[232] placed upon Soviet vessels delivering guided missiles to Cuba in late 1962, where the existence of the nations of the Western Hemisphere was threatened, justifying defensive action by those states, the People's Democratic Republic of North Korea was never threatened with direct injury of any kind. The threat of nuclear missiles is much more direct than an unarmed intelligence vessel. The coercion of the former is more immediate than that represented by the latter. The United States response to the Cuban missile threat presented by the Soviet Union, and so directed against her, could be more easily tolerated than North Korea's actions against the United States.

The burden falls upon the United States and the Soviet Union and any other Nations that may wish to pursue aggressive intelligence-gathering machinery, where international law fails to provide effective limitations on the procedure due to recent technological advances, to protect their own activities by whatever means of defense they have. This defense

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[232]See Mallison supra note 203, for an inquiry into the facts and legal implications of the Cuban Blockade of October 1962.

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must be strictly defensive in nature and purpose, and local in effect. Escort vessels for intelligence ships or escort aircraft for legitimate intelligence aircraft could be one form of protection. Should these efforts be unsuccessful or not used, the party to whom the vehicle gathering intelligence belongs should be required to bear the loss--regardless of a violation by the victim state of existing international law. The actual situation created by the Pueblo Incident and its aftermath was fortuitous. It would be advantageous for the peace of the world to consider such practice as international law. Whenever intelligence-gathering missions fail due to the acts of the victim states which the "attacker state" is at the time of the failure helpless to prevent, such failures to and the resultant loss in prestige and property (exclusive of personnel, who should be returned) must be borne by that state.

It would be only through such a practice that the development and maintenance of the important inclusive values of the world community could be maximized and the destructive values such as pride, ambition, and greed between nations be deemphasized so that, even without a world order system or specific international law to prevent destructive incidents such as the Pueblo seizure, the terrible consequences that could ensue would be more surely averted.